Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230
	)	
	)	

SECOND REPORT AND ORDER, ORDER ON RECONSIDERATION, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 8, 2004 **Released:** September 2, 2004

Comment Date: November 17, 2004
Reply Comment Date: December 17, 2004

By the Commission: Chairman Powell; Commissioners Abernathy and Martin issuing separate statements; Commissioner Adelstein approving in part, dissenting in part, and issuing a statement; Commissioner Copps dissenting and issuing a statement.

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APPENDICES:

I. INTRODUCTION

1. On May 15, 2003, we took significant first steps to facilitate the development of secondary markets in spectrum usage rights involving our Wireless Radio Services when we adopted our *Report and Order and Further Notice of Proposed Rulemaking* (*Report and Order* and *Further Notice*, respectively) in this proceeding.[1] In the *Report and Order*, we established policies and rules to enable spectrum users to gain access to licensed spectrum by entering into different types of spectrum leasing arrangements with licensees in most Wireless Radio Services.[2] In addition, we streamlined the Commission's approval procedures for license assignments and transfers of control in most Wireless Radio Services.[3] These steps advanced the general goal set forth in the Commission's *Secondary Markets Policy Statement*, namely that of significantly expanding and enhancing secondary markets to permit spectrum to flow more freely among users and uses in response to economic demand, to the extent consistent with our public interest objectives.[4] The policies we implemented also were consistent with several spectrum policy recommendations of the *Spectrum Policy Task Force Report*, including allowing more flexible use of spectrum by licensees and other spectrum users, better defining licensees' and

[1] *See generally* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Report and Order* and *Further Notice*, respectively), *Erratum*, 18 FCC Rcd 24817 (2003). By "spectrum usage rights," we refer to the terms, conditions, and period of use conferred under a license. *See Report and Order* at ¶ 1.

[2] *See generally id.* at ¶¶ 1-194.

[3] *See generally id.* at ¶¶ 195-203.

[4] *See generally* Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178 (2000) (*Secondary Markets Policy Statement*).

spectrum users' rights and responsibilities, enabling use of spectrum across various dimensions (frequency, space, and time), promoting the efficient use of spectrum, and providing for continued technological advances.[5] In the *Further Notice*, we proposed additional measures to facilitate the development of spectrum leasing, and sought particular comment on policies that could facilitate spectrum access for advanced technologies.[6]

2. Building upon the spectrum leasing framework we established in the *Report and Order*, we take several additional steps in this Second Report and Order to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements in a more timely fashion, in accord with evolving marketplace demands and customer needs. As with the underlying *Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country.[7] In addition, we implement policies enabling licensees and spectrum lessees to develop and manage "private commons" to provide more access to spectrum users and to take advantage of many of the advanced technologies that are being developed in the marketplace. Finally, we further streamline Commission approval procedures for certain classes of assignments and transfers of control in our Wireless Radio Services.

3. These additional steps to facilitate the development of secondary markets expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services, and enable development of additional and innovative services in rural areas.

II. EXECUTIVE SUMMARY

4. In this Second Report and Order,[8] we adopt several of the proposals set forth in the *Further Notice*, along with additional policies, to further facilitate the development of secondary markets in spectrum usage rights. Specifically, we –

- Adopt immediate approval procedures for certain categories of *de facto* transfer spectrum leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition;

- Further streamline our processing of short-term *de facto* transfer leases by replacing the Special Temporary Authority (STA) procedures with these new immediate approval procedures;

[5] *See generally* Spectrum Policy Task Force, ET Docket No. 02-135, *Report* (rel. Nov. 2002) (*Spectrum Policy Task Force Report*) at pp. 4, 16-23. This report is available at http://www.fcc.gov/sptf.

[6] *See generally Further Notice* at ¶¶ 213-323.

[7] *See generally Report and Order* at ¶¶ 2, 32-189.

[8] *See* Section IV, *infra*.

- Further streamline our processing of certain categories of spectrum manager leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition (consistent with the new policies we adopt for certain categories of *de facto* transfer leasing arrangements);

- Extend our spectrum leasing policies to additional Wireless Radio Services, including Public Safety services (so long as public safety licensees lease spectrum to other public safety entities or entities providing communications in support of public safety operations), Automated Maritime Telecommunications Systems (AMTS) services, and Multichannel Video Distribution and Data Service (MVDDS);

- Clarify our spectrum leasing policies with regard to designated entity and entrepreneur licensees;

- Clarify existing policies with regard to the use of "smart" or "opportunistic" use technologies in the context of secondary markets, including clarification that dynamic spectrum leasing arrangements are permitted under the spectrum leasing policies;

- Establish a new type of secondary market arrangement that facilitates the development of "private commons" in licensed wireless radio spectrum;

- Adopt the same immediate approval procedures for certain categories of license assignments and transfers of control as adopted for *de facto* transfer spectrum leasing arrangements; and

- Extend our policies for streamlined processing of license assignments and transfers of control to all of the Wireless Radio Services regulated by the Wireless Telecommunications Bureau (Bureau).

5. In the Order on Reconsideration,[9] we address five petitions for reconsideration that we received with regard to the *Report and Order*. These petitions touched on a variety of issues, including the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules, protections for the licensee or spectrum lessee in the event a spectrum lessee or a license is terminated, and the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

6. Finally, in the Second Further Notice of Proposed Rulemaking,[10] we seek comment on additional steps we could take to facilitate the development of secondary markets in spectrum usage rights. In particular, we request comment on policies that would further enhance the development of advanced technologies.

III. BACKGROUND

7. In the *Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband

[9] *See* Section V, *infra*.

[10] *See* Section VI, *infra*.

and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. Specifically, we established two different spectrum leasing approaches based on the scope of the rights and responsibilities to be assumed by the spectrum lessee. Under the first leasing option – "spectrum manager" leasing – we enabled parties to enter into spectrum leasing arrangements without prior Commission approval so long as the licensee retains both *de jure* control[11] of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing.[12] Under the second option – "*de facto* transfer" leasing – we permitted parties, pursuant to a streamlined approval process, to enter into leasing arrangements whereby the licensee retains *de jure* control of their licenses while *de facto* control over the use of the leased spectrum, and associated rights and responsibilities, are transferred for a defined period to the spectrum lessees. Parties may enter into either long-term or short-term *de facto* transfer leases, with some variation in the policies and procedures that apply to each type.[13] We also adopted streamlined Commission approval procedures for license assignments and transfers of control involving many of our Wireless Radio Services.[14]

8. In the *Further Notice*, we sought comment on various ways in which the Commission could further enhance opportunities for spectrum access, efficiency, and innovation by removing unnecessary regulatory barriers and implementing more market-oriented policies that would facilitate moving spectrum to its highest valued uses.[15] In particular, we sought comment on whether we could further streamline our processing of spectrum leasing arrangements and license assignments and transfers of control that did not raise a specified set of potential public interest concerns – relating to eligibility and use restrictions, foreign ownership, designated entity/entrepreneur issues, or competition – that would merit individualized Commission review.[16] We requested comment on whether our spectrum leasing policies should be extended to additional services,[17] and whether other actions should be taken to facilitate the development of secondary markets in spectrum usage rights.[18] Finally, we inquired as to what specific steps we could take, in the context of secondary markets, to maximize the potential public benefits enabled by advanced technologies, such as opportunistic devices.[19]

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[11] *De jure* control means legal control, or control as a matter of law. Typically, ownership of more than 50 percent of the voting stock of a corporate licensee evidences *de jure* control. *See generally* In re Application of Fox Television Stations, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd 8452, 8513-14 ¶¶ 151-153 (1995).

[12] *See generally Report and Order* at ¶¶ 82-125, 182-189. As explained more fully in the *Report and Order*, we adopted a new, more flexible *de facto* control standard that applies to spectrum leasing arrangements. *See id.* at ¶¶ 51-70.

[13] *See generally id.* at ¶¶ 82-92, 126-189.

[14] *See generally id.* at ¶¶ 195-203.

[15] *See generally Further Notice* at ¶¶ 213-323.

[16] *See id.* at ¶¶ 237-287.

[17] *See id.* at ¶¶ 288-313.

[18] *See generally id.* at ¶¶ 221-229 (achieving a more efficient spectrum marketplace), 315-319 (applying the new *de facto* control standard for spectrum leasing to other types of arrangements), 320-323 (considering the effect of secondary markets policies on designated entity and entrepreneur policies).

[19] *See id.* at ¶¶ 230-236.

9. In response to the *Further Notice*, we received twenty-one (21) comments and ten (10) reply comments.[20] Five parties filed petitions for reconsideration of the *Report and Order*, and several parties filed oppositions or comments in response.[21]

IV. SECOND REPORT AND ORDER

A. Spectrum Leasing Arrangements

1. Additional Streamlining of Procedures for Certain Categories of Spectrum Leases

10. In the *Report and Order*, we took significant steps to develop spectrum leasing policies for many of our Wireless Radio Services and to streamline the regulatory processes applicable to parties that seek to enter into these types of arrangements. In the *Further Notice*, we proposed additional steps to further reduce unnecessary delay in the implementation of certain categories of spectrum leasing arrangements to the extent doing so would be consistent with meeting our statutory obligations that such transactions would be in the public interest.[22] In this Second Report and Order, we adopt several measures to remove unnecessary delay in the implementation of spectrum leasing arrangements, as explained herein.

a. Immediate approval of certain categories of *de facto* transfer leases that are subject to our forbearance authority

(i) Background

11. Under current spectrum leasing policies and procedures, licensees and spectrum lessees may enter into both long- and short-term *de facto* transfer leases pursuant to streamlined application and approval procedures.[23] Specifically, parties that seek to enter into long-term *de facto* transfer leasing

[20] *See* AMTA Comments; APCO Comments; AT&T Wireless Comments and Reply Comments; BellSouth Comments; Boeing Reply Comments; Blooston Rural Carriers Comments; Cantor Fitzgerald Telecom Comments and Reply Comments; Cingular Wireless Comments; CTIA Comments; ITA Reply Comments; Mobex Comments; NAM/MRFAC Reply Comments; National ITFS Association Comments and Reply Comments; Nextel Communications Comments; Nextel Partners Reply Comments; PCIA Comments; Paging Systems Reply Comments; RTG Comments; Salmon PCS Comments; SBC Comments; Spectrum Market Comments; Sprint Comments; St. Clair County Reply Comments; T-Mobile Reply Comments; Verizon Wireless Comments; WCA Comments; WiNSeC Comments; Winstar Comments and Reply Comments. We also received *ex parte* comments from three parties. *See* Council Tree *Ex Parte* Comments; MDS America *Ex Parte* Comments; Salmon PCS *Ex Parte* Comments.

[21] *See* Blooston Rural Carriers Petition for Partial Reconsideration and/or Clarification; Cingular Wireless Petition for Reconsideration and Clarification; First Avenue Networks Petition for Reconsideration; NTCA Petition for Partial Reconsideration; Verizon Wireless Petition for Reconsideration and Clarification. In response, we received reply comments from Salmon PCS and RTG, an opposition was filed by the Fixed Wireless Communications Coalition, and an *ex parte* letter filed by PCIA's Microwave Cost Sharing Clearinghouse. *See generally* Salmon PCS Petition Reply Comments; RTG Petition Reply Comments (dated Feb. 13, 2004); Fixed Wireless Communications Coalition Opposition to Petition for Reconsideration; Letter to Katherine Harris, Deputy Chief, Mobility Division, from Eric W. DeSilva, Counsel to PCIA's Microwave Cost Sharing Clearinghouse (dated Mar. 25, 2004).

[22] *See generally Further Notice* at ¶¶ 237-240.

[23] *See generally Report and Order* at ¶¶ 150-154.

arrangements submit their applications, which are then placed on public notice[24] and subject to further individualized Commission review prior to grant. The applications then are approved (or denied) by the Wireless Telecommunications Bureau (Bureau) within twenty-one (21) days unless they are removed from streamlined processing for further review based on potential public interest concerns identified by the Commission or in petitions to deny.[25] Parties that seek to enter into short-term *de facto* transfer leases do so pursuant to the same processes applicable to STAs. These applications, which are not placed on prior public notice, are acted upon by the Bureau within ten (10) days if specified conditions are met.[26] Consistent with our policies for other approvals, approval of both of these types of *de facto* transfer lease applications also is subject to the Commission's reconsideration procedures.[27]

12. In the *Further Notice*, we sought comment on whether we could minimize delay in the timely implementation of *de facto* transfer leases by eliminating unnecessary regulatory review for certain classes of spectrum leases. For *de facto* transfer leases subject to our forbearance authority under Section 10 of the Communications Act,[28] we proposed to forbear, to the extent necessary, from requiring prior public notice and individualized Commission review and approval for spectrum leasing arrangements that did not raise any of a specified set of potential public interest concerns.[29]

13. Specifically, we proposed that if the spectrum lessee satisfied certain eligibility requirements and applicable use restrictions,[30] and the spectrum lease did not raise specified potential public interest

[24] The Wireless Telecommunications Bureau places these spectrum leasing applications on weekly public notices. We note that all *de facto* transfer spectrum leasing arrangements that fall within the scope of our forbearance authority – *i.e.*, those that involve licensees that are telecommunications carriers, as defined under the Act, or otherwise provide commercial radio services (CMRS) or common carrier-based services – generally are subject to the requirement, pursuant to Section 309(b), that the application be placed on public notice prior to grant. *See* 47 U.S.C. § 309(b). Those applications not statutorily subject to this requirement are placed on an "informational" public notice.

[25] As the Commission indicated in the *Report and Order*, these concerns might include foreign ownership or competition concerns, or other concerns requiring further review, such as those raised by petitions to deny (where such petitions are permitted under Section 309(d) of the Act). *See Report and Order* at ¶¶ 151-152; 47 U.S.C. §§ 309(b)-(d).

[26] *Report and Order* at ¶ 181.

[27] *See id.* at ¶ 152; *see generally* 47 C.F.R. § 1.101 *et seq.* (rules pertaining to petitions for reconsideration of actions taken on delegated authority).

[28] 47 U.S.C. § 160(a). As we noted in the *Further Notice*, our forbearance authority under Section 10 of the Communications Act applies to *de facto* transfer spectrum leases involving licensees that are telecommunications carriers, or that otherwise provide commercial mobile radio service and common carrier-based services. *See Further Notice* at ¶ 242.

[29] *See id.* at ¶¶ 244, 246-265, 268. In particular, we proposed to forbear from the requirements of Sections 308, 309, and 310(d) of the Communications Act to the extent necessary to permit the Commission to process notification filings regarding certain categories of *de facto* transfer leases without 30 days prior public notice and without prior Commission review and consent. *Id.* at ¶¶ 244, 246.

[30] In the *Further Notice*, we proposed to forbear from requiring prior approval of *de facto* transfer spectrum leases provided, among other things, that the spectrum lessee certifies in the spectrum lease filing that it meets the basic qualification requirements for holding the license authorization associated with the lease, and that it would comply with all applicable use restrictions. *See id.* at ¶¶ 247-250. Thus, for example, a lessee would be (continued....)

concerns relating to foreign ownership,[31] designated entity/entrepreneur,[32] or competition policies,[33] we would require only that the spectrum leasing parties notify the Commission of the spectrum leasing arrangement within 14 days of executing the lease.[34] Once the parties notified the Commission of a spectrum leasing arrangement that met these qualifications, we proposed that the lease would be deemed approved as of the time that the Bureau placed it on public notice.[35] Thereafter, our approval of the spectrum leasing arrangement would be subject to the Commission's reconsideration procedures. Any interested party would be entitled, consistent with our rules and policies concerning standing, to petition for reconsideration of our approval of the spectrum leasing arrangement within 30 days of the public notice date.[36] Similarly, the Bureau would be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission could reconsider the grant on its own motion within 40 days of the public notice date.[37] We also inquired whether there were additional classes of leases that might raise other public interest concerns for which prior individualized Commission review and approval would continue to be appropriate.[38]

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required to have the requisite character qualifications and to be able to certify its compliance under the Anti-Drug Abuse Act of 1988. *See* 21 U.S.C. § 862; 47 C.F.R. § 1.2001 *et seq.*

[31] We proposed to forbear from requiring prior Commission review of *de facto* transfer spectrum leases so long as such leases would not, among other things, raise certain specified potential foreign ownership concerns. *See Further Notice* at ¶¶ 251-253.

[32] *See id.* at ¶¶ 266, 268. Noting that designated entity and entrepreneur licensees had received special benefits (*e.g.*, bidding credits, installment payment plans, or closed bidding licenses) from the Commission and that, as a result, would continue to remain subject to any applicable eligibility and use restrictions when leasing to spectrum lessees, we sought general comment on how our forbearance proposal would address spectrum leasing by designated entity and entrepreneur licensees. *See id.* at ¶¶ 266, 268.

[33] We sought comment in the *Further Notice* on possible benchmarks or safe harbors that would allow certain classes of *de facto* transfer leases that would not pose any significant risk to our competition policies to proceed without prior public notice and Commission review. *Id.* at ¶¶ 257-262. Specifically, we proposed to establish benchmarks that considered the competitive effects on both the input and output markets. *Id.* at ¶ 258 & n.454.

[34] *Id.* at ¶ 266. Under the proposal set forth in the *Further Notice*, both spectrum leasing parties would be involved in filing the application. *Id.* This is consistent with current requirements pertaining to *de facto* transfer spectrum leasing applications. *See Report and Order* at ¶ 151.

[35] *Further Notice* at ¶ 266.

[36] *Id.* at ¶ 268; *see* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b).

[37] *Further Notice* at ¶ 268; *see* 47 C.F.R. §§ 1.108, 1.117. We also noted that, should information be brought to our attention at some later date suggesting that the parties to a spectrum lease implemented pursuant to this proposed forbearance option had not complied with the requirements and conditions we adopt for such action, the Commission could initiate a formal or informal investigation. *Further Notice* at ¶ 268 n.461; *see* 47 C.F.R. §§ 1.80, 1.89, 1.91, 1.92.

[38] *Further Notice* at ¶¶ 263-265.

(ii) Discussion

14. Consistent with the broad support by commenters for the general forbearance proposal set forth in the *Further Notice*,[39] we adopt this proposal, with certain modifications, as discussed herein. Under the approach we adopt, spectrum leasing parties[40] that seek to enter into *de facto* transfer spectrum leases that qualify under this forbearance approach may file their spectrum lease application[41] with the Commission, which in turn will be immediately approved under the procedures set forth below.[42] Because we determine that *de facto* transfer leases meeting the specifications described below do not raise potential public interest concerns that would necessitate prior public notice or more individualized review, we believe that removing this unnecessary round of notice and regulatory review is appropriate, pursuant to our forbearance authority. This action serves the Commission's policy goals of facilitating secondary markets in spectrum usage rights by enabling parties to implement spectrum leasing arrangements without undue delay. At the same time, it continues to protect the public interest by subjecting these arrangements, following approval, to public notice and possible additional review under the Commission's reconsideration procedures should that be warranted.

(a) Elements of *de facto* transfer leasing transactions that would not require prior public notice and individualized Commission review

15. We will permit all *de facto* transfer spectrum leases that are subject to the Commission's forbearance authority and that do not potentially raise certain specified public interest concerns to proceed pursuant to the application and immediate grant procedures set forth in Section IV.A.1.a(ii)(b), below. As discussed in this section, if a particular *de facto* transfer leasing arrangement does not raise potential concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, we conclude, under our forbearance authority, that we need no longer require prior public notice and individualized Commission review before the spectrum lease may become effective.[43] Therefore, once parties file a spectrum leasing application consistent with

[39] All parties commenting on the forbearance proposal supported the Commission's general approach. *See, e.g.*, Blooston Rural Carriers Comments at 11-12; Cantor Fitzgerald Telecom Comments at 2; CTIA Comments at 2-4; Nextel Communications Comments at 6-9; Nextel Partners Reply Comments at 8; PCIA Comments at 5; RTG Comments at 2-5; SBC Comments at 7-10; Spectrum Market Comments at 4; T-Mobile Reply Comments at 6-8; WCA Comments at 11-15; Winstar Comments at 2. Some commenters recommended certain revisions to the particular elements proposed, as discussed more fully below.

[40] Spectrum leasing parties include licensees and spectrum lessees. The term "spectrum lessee," as used throughout this report, includes spectrum lessees and spectrum sublessees that have entered into spectrum subleasing arrangements as permitted under our spectrum leasing policies and rules.

[41] Because we determine to require that the *de facto* transfer spectrum leasing arrangements be approved, we use the term "application" instead of the term "notification" used in the *Further Notice.*

[42] As we explain more fully below, under the immediate approval process, spectrum leasing parties must submit qualifying applications and include the requisite filing fees. The Bureau will then process the application overnight and, provided that the payment of the requisite filing fees have been confirmed, indicate in our Universal Licensing System (ULS) that the application has been approved. *See* Section IV.A.1.a(ii)(b), *infra.*

[43] If spectrum leasing parties do not qualify for this type of processing, they must proceed pursuant to the streamlined 21-day process set forth in the *Report and Order*. *See Report and Order* at ¶¶ 151-154.

these requirements, it will immediately be approved under the policies and rules we are adopting herein, and spectrum lessees may commence operations as provided under the terms of the lease.[44]

16. *Eligibility and use restrictions.* As proposed in the *Further Notice*, parties seeking to use the application/immediate approval procedures adopted under this forbearance approach for *de facto* transfer spectrum leases must comply, *inter alia*, with the applicable eligibility and use restrictions. Accordingly, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must certify that it meets the basic qualification requirements for holding the license authorization associated with the lease and that it will comply with all applicable use restrictions.[45]

17. As discussed in the *Further Notice*, we believe that spectrum lessee compliance with these requirements is necessary because, in many services, we continue to have eligibility and use restrictions that were adopted in furtherance of certain public interest objectives.[46] While we seek to promote licensee flexibility and facilitate secondary markets where appropriate, we do not intend for policies adopted in this proceeding to be used as a means for evading requirements that remain in effect for a given service.[47] Having spectrum lessees certify to the Commission that they will comply with applicable eligibility and use restrictions will ensure that spectrum leasing arrangements approved under the forbearance approach do not undermine these policies.

18. Consistent with the policies we adopted in the *Report and Order*, the applicable eligibility restrictions are the same for both long-term and short-term *de facto* transfer leases.[48] The applicable use restrictions may, however, differ depending on whether a long or short-term *de facto* transfer lease is involved.[49] As provided in the *Report and Order*, we permit some additional flexibility under short-term *de facto* transfer leasing with respect to one particular set of use restrictions; specifically, we permit licensees with service authorizations that restrict use of spectrum to non-commercial uses to enter into short-term *de facto* transfer leases to allow the spectrum lessee to use it commercially.[50]

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[44] Thus, if the spectrum leasing parties indicate on the application that, under the terms of the lease, the spectrum lessee will commence the spectrum lease as of the date that the Commission approves the arrangement, then that will be the date on which the Commission's policies and rules regarding *de facto* transfer leases will be applied with regard to the leased spectrum. If, however, the spectrum leasing parties have indicated in the lease application that commencement is due to occur at some later date, then the date indicated will apply.

[45] We note that only a few commented on this proposal, with most providing general support for it. *See, e.g.*, Blooston Rural Carriers Comments at 12; RTG Comments at 2-3. Only one commenter opposed such restrictions. *See* AT&T Wireless Comments at 6.

[46] *Further Notice* at ¶ 248.

[47] *Id.*

[48] *See Report and Order* at ¶ 143 (eligibility requirements applicable to long-term *de facto* transfer leases), ¶ 174 (eligibility requirements applicable to short-term *de facto* transfer leases); 47 C.F.R. §§ 1.9030(d)(2), 1.9035(d)(1).

[49] *See Report and Order* at ¶ 144 (use restrictions applicable to long-term *de facto* transfer leases), ¶ 175 (use restrictions applicable to short-term *de facto* transfer leases); 47 C.F.R. §§ 1.9030(d)(3), 1.9035(d)(1).

[50] *Report and Order* at ¶ 175; 47 C.F.R. § 1.9035(d)(1).

19. *Foreign ownership.* As we generally proposed in the *Further Notice*, we determine that spectrum lessees seeking to enter into *de facto* transfer leases under this forbearance approach must be able to certify that they comply with specific requirements, described below, to ensure that the spectrum lease does not raise foreign ownership concerns under Section 310 of the Act that remain unaddressed prior to implementation of the lease. This approach will enable most *de facto* transfer leases to proceed immediately, while ensuring that the Commission and the Executive Branch have the opportunity to review any lease that may raise potential foreign ownership concerns prior to that spectrum lease going into effect.

20. Under the policy we are adopting, the spectrum lessee must certify that it is not a foreign government or representative thereof, consistent with the Section 310(a) requirements.[51] Second, if the spectrum lease involves a common carrier radio authorization, the spectrum lessee must certify that it is not an alien or representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership, in accord with the requirements of Sections 310(b)(1)-(3).[52]

21. Finally, consistent with our policies under Section 310(b)(4),[53] as explained in the *Further Notice*,[54] the spectrum lessee must certify either (1) that it does not have more than 25 percent indirect foreign ownership or (2) that it has previously obtained a declaratory ruling from the Commission in advance of entering into the subject spectrum lease that establishes that the spectrum lease falls within

[51] 47 U.S.C. § 310(a).

[52] *Id.* § 310(b)(1)-(3).

[53] *Id.* § 310(b)(4).

[54] As noted in the *Further Notice*, we have traditionally conducted our Section 310(b)(4) public interest analysis of indirect foreign ownership in excess of 25 percent in the context of specific applications (whether for a new authorization or in connection with a transfer of control or license assignment) involving an entity with such ownership or in response to a request for declaratory ruling. *See, e.g.*, Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, 16 FCC Rcd 22897 (2001), *Erratum*, 17 FCC Rcd 2147 (2002), *recon. denied*, 17 FCC Rcd 14030 (2002). Moreover, under the *Foreign Participation Order*, we treat different classes of foreign ownership differently, depending upon whether the applicant is from a WTO-member country or a non-WTO-member country. *See Foreign Participation Order*, 12 FCC Rcd at 23902-23903 ¶¶ 26-27. Under the current standard, an applicant that demonstrates more than 25 percent indirect foreign ownership attributable to entities from WTO member countries is entitled to a presumption that no competitive concerns are raised by the proposed investment, subject to Commission consideration of any relevant factors and evidence that might tend to rebut the presumption. *See, e.g.*, General Electric Capital Corporation and SES Global, S.A., *Order and Authorization*, 16 FCC Rcd 17575, 17579 ¶ 30 (IB & WTB 2001); *see also Foreign Participation Order*, 12 FCC Rcd at 23913-23915 ¶¶ 50-53, 23940 ¶¶ 111-112. We do not presume, however, that indirect foreign investment from WTO-member countries poses no national security, law enforcement, foreign policy, or trade concerns, and accord deference to the expertise of Executive Branch agencies in identifying and interpreting these issues of concern in the context of particular applications and petitions for declaratory ruling under Section 310(b)(4). *See Foreign Participation Order*, 12 FCC Rcd at 23919-23920 ¶¶ 63-64. In contrast, an applicant that demonstrates more than 25 percent indirect foreign ownership attributable to entities from non-WTO member countries does not receive the favorable presumption and must meet the more demanding effective competitive opportunities test. *See id.* at 23946 ¶ 131.

the scope of that declaratory ruling (including the type of service and geographic coverage area) and that there has been no change in foreign ownership in the meantime. We emphasize that the spectrum lessee is primarily and directly responsible for ensuring that the scope of its prior declaratory ruling covers the proposed lease transaction. If it does not, the spectrum lessee must obtain a supplemental ruling that would apply to the particular transaction, and must do so *prior* to filing under the new immediate approval procedures. For example, a spectrum lessee may have previously received a ruling that approved its acquisition of a specific group of common carrier microwave licenses, or that approved its acquisition of a controlling interest in a carrier that holds a specific group of common carrier microwave licenses. Such a ruling would not cover a future spectrum lease of PCS spectrum. In such circumstances, in order for the spectrum lessee to be able to satisfy the certification requirement, it must first request and obtain from the Commission a supplemental ruling to cover the spectrum leasing arrangements involving PCS spectrum.

22. We recognize that this approach could require a spectrum lessee with indirect foreign ownership above 25 percent to file multiple Section 310(b)(4) requests in order to take advantage of the new immediate approval procedures for spectrum leases. The need to make multiple filings for Section 310(b)(4) approval could undercut many of the efficiencies provided by the new procedures. In order to minimize the need to request multiple Section 310(b)(4) rulings, we will entertain petitions for Section 310(b)(4) rulings that seek to cover future spectrum leasing arrangements involving spectrum for services and geographic coverage areas specified in the petitions. We also will entertain petitions that seek to cover such spectrum leases entered into by the petitioning carrier, as well as by wholly-owned subsidiaries of that carrier. However, in order to discourage the filing of speculative petitions, which would impose undue administrative burdens on Commission resources, we note that we will entertain petitions for such "blanket" rulings only in conjunction with a spectrum lease application that would be covered by the requested ruling. Consistent with our current practice, we will forward the petition for declaratory ruling to the appropriate Executive Branch agencies and process the application under our current streamlined procedures, assuming the application is otherwise eligible for such processing. We believe this approach eliminates unnecessary regulatory hurdles for carriers seeking maximum flexibility to expand the scope of their service offerings, while continuing to ensure that the Commission and the Executive Branch have a meaningful opportunity to review applications and petitions for potential harms to national security, law enforcement, public safety, security of critical infrastructure, foreign policy, and trade policy.[55]

[55] One commenter, T-Mobile, recommended that the Commission include in the forbearance approach those leases in which either (i) the proposed lessee has obtained a declaratory ruling for foreign ownership above 25 percent or (ii) the 100 percent direct or indirect parent of the lessee has obtained such a declaratory ruling. T-Mobile Comments at 2-4. T-Mobile made the same recommendation with respect to our forbearance proposal for applications to assign or transfer control of wireless licenses. *Id.* We find that the approach we adopt here strikes the optimum balance between the concerns raised by T-Mobile, reducing transaction costs, including unnecessary regulatory delay, and the concerns raised by the Executive Branch in numerous licensing proceedings before the Commission. *See, e.g.*, Applications of Vodafone AirTouch, plc., and Bell Atlantic Corporation, For Consent to Transfer of Control or Assignment of Licenses and Authorizations, *Memorandum Opinion and Order*, 15 FCC Rcd 16507 (WTB/IB 2000); Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001); Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc., and Telenor Satellite, Inc., Assignee, *Order and Authorization*, 16 FCC Rcd 22897 (2001); Space Station System Licensee, Inc. (Assignor) and Iridium Constellation LLC (Assignee) et al., *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (IB 2002); Global Crossing, Ltd. (Debtor-in-
(continued….)

23. We note that because the same foreign ownership policies apply to both long-term and short-term *de facto* transfer leasing arrangements,[56] spectrum lessees under both of these types of *de facto* transfer lease applications will be required to make these certifications.

24. *Designated entity/entrepreneur eligibility.* Because designated entity and entrepreneur licensees have been conferred special benefits (*e.g.*, bidding credits, installment payment plans, or participation in closed bidding) by the Commission, and because these licensees may enter into long-term *de facto* transfer spectrum leasing arrangements only so long as such arrangements are consistent with our policies relating to applicable transfer restrictions and unjust enrichment payment obligations,[57] we believe it is both necessary and appropriate to retain the ability to review all long-term *de facto* transfer spectrum leasing arrangements involving designated entity or entrepreneur licensees to ensure compliance with applicable policies and rules, and thus such leasing arrangements cannot be processed under these procedures.[58] As we stated in the *Further Notice*, we do not intend for the forbearance approach to be used as a means to evade Commission rules,[59] and we believe this to be especially important where the rules have been implemented to fulfill our statutory obligations.[60] Given, however, that we have eliminated all of these restrictions with regard to short-term *de facto* transfer leases,[61] we determine that applications involving short-term *de facto* transfer leases do not raise any potential public interest concerns relating to our designated entity or entrepreneur policies that would preclude the spectrum leasing parties from proceeding under our forbearance approach.

25. *Competition.* In light of the Commission's competition policies for Wireless Radio Services, we will permit spectrum leasing parties to proceed under our forbearance approach so long as the *de facto* transfer leasing arrangement does not raise potential competition concerns that merit prior public notice and Commission review before the application is approved. Consistent with our competition policies, however, we will exclude from this approach, at this time, all long-term *de facto* transfer leases

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Possession), Transferor, and GC Acquisition Limited, Transferee, *Order and Authorization*, 18 FCC Rcd 20301 (IB/WCB/WTB 2003) (*recon. pending*).

[56] *See Report and Order* at ¶¶ 110, 143; 47 C.F.R. §§ 1.9020(d)(2)(ii), 1.9030(d)(2)(ii).

[57] *See Report and Order* at ¶ 145; see also the discussion in Section IV.A.4, below.

[58] Our decision not to forbear with regard to this class of spectrum leases is consistent with the Commission's determination not to forbear from prior notice and individualized approval requirements with regard to *pro forma* transactions involving designated entity and entrepreneur licensees. *See* Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6307-6308 ¶¶ 25-26 (1998) (*Pro Forma Forbearance Order*).

[59] *Further Notice* at ¶ 248. While several commenters sought either modification or elimination of restrictions on spectrum leasing by designated entity and entrepreneur licensees, none recommended how the Commission should address eligibility-related restrictions in the context of the forbearance proposal in the event certain restrictions remained in place. *See* AT&T Wireless Comments at 6-9; Blooston Rural Carriers Comments at 3-5; Cingular Wireless Comments at 2-8; RTG Comments at 5-7. We discuss these comments more fully in Section IV.A.4, below, where we provide additional clarification on how the designated entity and entrepreneur policies will be applied in the context of spectrum leasing.

[60] *See generally Report and Order* at ¶¶ 237-238, 240, 245, 248, 251, 257, 263.

[61] *Id.* at ¶ 176; 47 C.F.R. § 1.9035(d)(2).

involving spectrum that (1) is, or may reasonably be, used to provide interconnected mobile voice and/or data services and (2) creates a "geographic overlap" with other spectrum used to provide these services in which the spectrum lessee holds a direct or indirect interest (of 10 percent or more),[62] either as a licensee or as a spectrum lessee. Because the latter class of *de facto* transfer leases potentially raise competition concerns, they will continue to be subject to case-by-case review and approval under the policies we adopted in the *Report and Order*.[63]

26. As we noted in the *Report and Order*, assessment of potential competitive effects of spectrum leasing transactions remains an important element of our policies to promote facilities-based competition and guard against the harmful effects of anticompetitive conduct, and we thus apply the Commission's general competition policies to transactions involving long-term *de facto* transfer spectrum leases (as well as to spectrum manager leases).[64] The approach we adopt herein, pursuant to our forbearance authority, is designed to be consistent with our current competition policies with regard to Wireless Radio Services. In examining transactions for possible competitive harm, the Commission has primarily focused its efforts in recent years on services that could potentially affect the product market for mobile telephony, which includes interconnected mobile voice and/or data services.[65] Cellular, broadband Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services currently are used to provide CMRS services that potentially affect the mobile telephony market, and expressly are subject to the Commission's competition policies set forth in the *2000 Biennial Review Order on CMRS Aggregation Limits*.[66] In addition, spectrum in several other services may currently, or

[62] For the purpose of implementing this requirement, we define these direct or indirect interests in the same manner as defined pursuant to existing rules for wireless licensees under Part 1. In particular, a lessee must disclose whether it has a 10 percent direct or indirect interest in an entity, as defined in Section 1.2112 of our rules. *See* 47 C.F.R. § 1.2112; *see also* 47 C.F.R. §§ 1.919 (ownership information relating to Wireless Radio Service licensees and applicants); 1.948 (ownership reporting requirements for transfers and assignments); *cf. Report and Order* at ¶¶ 119 (requiring spectrum lessees under spectrum manager leases to disclose, in the lease notification, whether they already hold direct or indirect interests, of 10 percent or more, in 10 MHz or more of certain CMRS spectrum in a particular geographic area, either as a licensee or spectrum lessee), 147 (requiring spectrum lessees under long-term *de facto* transfer leases to disclose, in the lease application, whether they already hold direct or indirect interests, of 10 percent or more, in 10 MHz or more of certain CMRS spectrum in a particular geographic area, either as a licensee or spectrum lessee).

[63] *See Report and Order* at ¶ 147 (citing ¶¶ 116-119 of the *Report and Order*). This is spectrum that the Commission has licensed with a mobile allocation and corresponding service rules; it is suitable for the provision of mobile telephony services on the basis of its physical properties, the state of equipment technology, and the relevant interference rights and obligations.

[64] *See Report and Order* at ¶¶ 116-119 (applying the Commission's competition policies to spectrum manager leases), 147 (applying the Commission's competition policies to long-term *de facto* transfer leases).

[65] *See, e.g.*, 2000 Biennial Regulatory Review – Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001) (*2000 Biennial Review Order on CMRS Aggregation Limits*).

[66] *See generally id.* In that order, the Commission noted that it would continue to have an obligation to guard against potential anticompetitive effects that might result from entities aggregating control over spectrum. *See generally id.*, 16 FCC Rcd at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65. We note, however, that the cellular cross-interest rules were eliminated in the *Rural Report and Order* adopted concurrently with this Second Report and Order. *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, (continued....)

at some time in the future, be used to provide such CMRS services; these services include several services licensed under Part 27 of our rules[67] – including the Wireless Communications Service (WCS),[68] Broadband Radio Service,[69] Advanced Wireless Service (AWS),[70] the upper and lower 700 MHz bands,[71] and the 1390-1392 MHz, 1392-1395/1432-1435 MHz, and 2385-2390 MHz bands[72] – as well as narrowband PCS,[73] various paging services,[74] and mobile satellite service where the use of ancillary terrestrial components (ATC) is permissible.[75] Accordingly, under the policies we adopt herein, we find

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WT Docket No. 02-381; 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14; Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation, WT Docket No. 03-202, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-166 (rel. Aug. __, 2004) (*Rural Report and Order*). Accordingly, we will revise our spectrum leasing rules to reflect elimination of these rules in the context of spectrum leasing arrangements, as discussed below. *See* para. 157, *infra*.

[67] *See generally* 47 C.F.R. Part 27. Each of the Part 27 services listed here may provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[68] *See generally* 47 C.F.R. Part 27 subpart E. The licensed spectrum in the WCS band includes the 2305-2320 MHz and 2345-2360 MHz bands, and may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[69] 47 C.F.R. Part 27 subpart M. Pursuant to the Commission's competition policies, the Wireless Telecommunications Bureau and Media Bureau have recently examined transactions involving the assignment of MDS and ITFS licenses to determine whether potential competitive concerns were raised. *See* Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor in Possession) to Nextel Spectrum Acquisition Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 6232, 6244 ¶ 29 (2004) (WTB and MB) (determining that the potential benefits of the transaction outweighed any potential competitive harm, and the that the transaction was in the public interest).

[70] *See generally* 47 C.F.R. Part 27 (including rules applicable to AWS). The licensed spectrum in these bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation). The Commission adopted the AWS service rules in 2003. *See* Service Rules for Advanced Wireless Services in the 1.7GHz and 21.GHz Bands, *Report and Order*, 18 FCC Rcd 25162 (2003). We note, too, that we determined to extend the spectrum leasing policies and rules adopted in the *Report and Order* to the AWS band. *See id.* at 25173-25174 ¶ 26. As part of this Second Report and Order and Order on Reconsideration, we will revise our Part 1 subpart X rules applicable to spectrum leasing arrangements to reflect that AWS is one of the included services.

[71] 47 C.F.R. Part 27 subparts F, H. The licensed spectrum in these bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[72] 47 C.F.R. Part 27 subparts I, J, K. These bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.802, 27.902, 27.1002.

[73] 47 C.F.R. § Part 24 subpart D. Operators may provide mobile telephony services on spectrum in the narrowband PCS band. *See* 47 C.F.R. § 24.3.

[74] These would involve certain frequencies in the Paging and Radio Telephone Service. *See* 47 C.F.R. §§ 20.561 (providing for one-way or two-way mobile operation on certain VHF and UHF channels); 22.651 (providing for trunked mobile operation on 470-512 MHz channels in New York-Northern New Jersey and Houston).

[75] 47 C.F.R. § 25.143(i)-(k).

that long-term *de facto* transfer leasing transactions that involve a geographic overlap between or among any of these listed services, and are to be used to provide mobile telephony service, continue to merit public notice and case-by-case review by the Commission prior to approval.[76] Such transactions potentially raise public interest concerns relating to competition, and thus will not be subject to our forbearance approach at this time.

27. Thus, if the spectrum leasing transaction does not involve a geographic overlap with spectrum held by the spectrum lessee in any of the particular services listed, as described above, we will permit the leasing arrangement to proceed without prior public notice or case-by-case review. We note, however, that because of the emergence of new technologies and the convergence of different services (*e.g.*, wireline and wireless services),[77] our identification of those classes of spectrum leasing arrangements currently raising possible competitive concerns may not always capture that class of transactions that may raise competitive concerns in the future. For instance, new product markets may emerge through the bundling of different services, thus requiring us to determine whether such a new product market may raise competitive concerns. Alternatively, competition issues might arise if there was significant intermodal consolidation of services. Accordingly, as the Commission gains more experience with regard to these transactions and the kinds of competitive concerns that may arise, further refinements may be made to the forbearance approach we are adopting herein. In addition, to the extent that we determine that a spectrum leasing transaction raises an unanticipated potential competitive concern (*e.g.*, new and evolving product markets, intermodal consolidation), we reserve the right to reconsider the grant of a spectrum leasing transaction during our reconsideration process.

28. *Other public interest concerns.* Finally, we note that *de facto* transfer leasing arrangements that would require waiver of Commission policies or rules, or a declaratory ruling relating to them, may not use the streamlined processing we are adopting under this forbearance approach. Requests for a waiver or declaratory ruling implicates other potential public interest concerns associated with the license or spectrum leasing authorization, and would first need to be approved by the Commission. This policy will be applied with respect to both long- and short-term *de facto* transfer leasing arrangements.

(b) Application and immediate approval procedures

29. *Application/immediate approval procedures.* Consistent with the general proposal set forth in the *Further Notice*, we will no longer require prior public notice and individualized Commission review of *de facto* transfer leases that meet the requirements specified above. Under the policies and rules adopted herein, parties seeking to enter into such leasing arrangements will notify the Commission by filing *de facto* transfer lease applications, which in turn will be immediately approved under the procedures we are adopting herein. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application establishes the requisite elements explained above and are otherwise complete and the payment of the requisite filing fees have

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[76] We have already determined that short-term *de facto* transfer spectrum leasing arrangements, which are by definition only temporary arrangements, do not raise potential competitive harm and thus are not subject to the Commission's competition policies. *See Report and Order* at ¶ 178.

[77] For instance, in the future we anticipate significant advances in voice over Internet Protocol (VoIP) and the provision of broadband services over power line systems. *See generally* In the Matter of IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004); Carrier Current Systems, including Broadband over Power Line Systems, *Notice of Proposed Rulemaking*, 19 FCC Rcd 3335 (2004).

been confirmed,[78] the Bureau will process the application and provide immediate approval through ULS processing. Approval will be reflected in ULS on the next business day after filing the application. Upon receiving approval, spectrum lessees will have the authority to commence operations under the terms of the spectrum lease.[79] The Bureau also will place the approved application on public notice.[80] We note that, in order to allow parties to enter into spectrum leasing arrangements more quickly, the immediate approval procedures that we are adopting vary slightly from what was proposed in the *Further Notice* in that approval occurs prior to the date that the application is placed on public notice.[81]

30. The changes adopted to facilitate even more efficient and timely processing of spectrum leasing transactions meeting the requirements set forth in this Second Report and Order necessitate changes to the ULS software and will required certain database updates. We accordingly direct the Bureau to undertake as soon as practicable the necessary programming changes to implement the provisions of this Second Report and Order and to modify as necessary any licensing databases. Once ULS is updated to permit the immediate approval process, we further direct the Bureau to release a public notice notifying the public that the new procedures are available.

31. *Post-approval reconsideration procedures.* We adopt the reconsideration procedures set forth in the *Further Notice*.[82] Accordingly, we will place the approved *de facto* transfer leases on a weekly informational public notice. Any interested party may file a petition for reconsideration within 30 days of the public notice date.[83] Similarly, the Bureau will be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission can reconsider the grant on its own motion within 40 days of the public notice date.[84]

32. These reconsideration procedures are consistent with our general reconsideration procedures for Bureau action taken on delegated authority, including action approving assignments and transfers of control under Sections 308, 309, and 310(d).[85] We believe that these reconsideration procedures provide

[78] *See Report and Order* at nn. 318, 356 (noting that, as part of a complete application, spectrum leasing parties must submit the requisite filing fees).

[79] Thus, operations under a *de facto* transfer spectrum lease could commence immediately upon approval provided, of course, that the parties have established that time as the date that the spectrum lease commences.

[80] The Bureau will also send a letter to the spectrum leasing parties, by U.S. mail, indicating that the application was sufficiently complete and has been granted on the basis of, and in reliance on, the information and certifications supplied.

[81] In the *Further Notice*, we had proposed that the spectrum leasing filing would be "deemed approved" at the time it was placed on public notice. *Further Notice* at ¶ 266.

[82] *See id.* at ¶ 268.

[83] *See* 47 C.F.R. § 1.106(f). We note that the Commission employs similar reconsideration procedures for applications involving *pro forma* license assignments and transfers of control; as with the procedures adopted here, interested parties may file a petition for reconsideration within 30 days of the time the notice of the *pro forma* transaction is placed on public notice. *See Pro Forma Forbearance Order*, 13 FCC Rcd at 6312 ¶ 36.

[84] *See* 47 C.F.R. §§ 1.108, 1.113.

[85] *See generally* 47 C.F.R. §§ 1.101-1.120 (Part 1 rules relating to petitions for reconsideration and review of actions taken on delegated authority and by the Commission).

a sufficient opportunity for review by interested parties, the Bureau, or the Commission of any *de facto* transfer lease that meets the conditions for approval without prior public notice or Commission review. To the extent that issues are raised on reconsideration regarding whether a particular spectrum lease complies with Commission policies and rules, the Bureau or Commission may deny the spectrum leasing application on reconsideration or take other necessary action, including requiring revisions to the leasing arrangement if appropriate.

33. *Other issues.* Parties will be held accountable for any certifications they make in the spectrum leasing applications that enable them to take advantage of the immediate approval procedures set forth herein. To the extent that the Commission determines, post-approval, that any certification provided on the application, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum leasing arrangement.[86] In addition, we note that the Commission reserves the right, post-approval, to correct administrative errors.[87]

(c) Compliance with forbearance requirements

34. As stated above, we determine that for all qualifying *de facto* transfer leases – *i.e.*, those subject to our Section 10 forbearance authority and satisfying the elements set forth in Section IV.A.1.a(ii), above – we will forbear from the applicable prior public notice requirements and individualized review requirements of Sections 308, 309, and 310(d) of the Communications Act,[88] to the extent necessary, so that these spectrum leases may be approved pursuant to the procedures set forth in Section IV.A.1.a(ii)(b), above. Our decision to forbear meets the requirements of Section 10 of the Act, which enables the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if the following three-prong test is satisfied: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[89]

[86] We note that this is consistent with general Commission policies.

[87] *See, e.g., American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145-146 (1958) (acknowledging an agency's ability to correct administrative errors; the Court stated that "[t]o hold otherwise would be to say that once an error has been done the agency is powerless to take remedial steps"); *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5th Cir.) *cert. den.*, 449 U.S. 826 (1980).

[88] Section 309(b) requires a 30-day notice and comment period for authorizations involving common carrier services, while Section 310(d) requires review and approval for transfers of *de facto* control relating to license authorizations. *See generally* 47 U.S.C. §§ 309(b), 310(d). We note that in the *Report and Order*, we have already exercised limited forbearance with regard to the 30-day notice and comment period for *de facto* transfer leases by reducing the comment period to 14 days. *Report and Order* at ¶ 151. We also reduced the review period to 21 days, unless the Commission determined to removed the application from this streamlined processing for additional review. *Report and Order* at ¶ 151.

[89] 47 U.S.C. § 160(a). In determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among telecommunications service providers. *See* 47 U.S.C. § 160(b). If the (continued....)

35. Examining the first prong of the forbearance test, we conclude that for *de facto* transfer spectrum leases meeting the elements set forth in Section IV.A.1.a(ii)(a), above, the prior public notice and individualized review requirements of Sections 309(b)[90] and 310(d) are not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory.[91] Indeed, even when parties file applications proposing a transfer of control or assignment of a license, such applications do not generally contain information on the charges, practices, classifications, or services of the parties involved, and we have declined to use such applications as a context for regulating these issues.[92] Because we do not address these issues in our review of these applications, retaining prior public notice and review requirements is not necessary to ensure that licensees' and lessees' charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory. In addition, the eligibility, foreign ownership, and competition benchmarks we establish limit the types of *de facto* transfer spectrum leases that qualify for forbearance to those that are unlikely to raise concerns about the charges, practices, classifications, and services of the parties to the spectrum lease. Moreover, as indicated in the *Further Notice*, we have other existing tools at our disposal, including enforcement actions, to ensure that charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.[93]

36. Similarly, in analyzing the second prong of the Section 10 forbearance standard, we conclude that requiring prior notice and comment and Commission review of qualifying *de facto* transfer leases is not necessary for the protection of consumers. Indeed, we have determined that effectively functioning secondary markets will offer significant benefits to consumers,[94] and we regard consumers as fully protected by the limitations and safeguards placed on the forbearance process. Our screening criteria ensure that forbearance procedures will only apply to spectrum leases that do not raise potential competitive issues, which is a core aspect of protecting consumers in the wireless marketplace. In

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Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for finding that forbearance is in the public interest. *See* 47 U.S.C. § 160(b).

[90] Long-term *de facto* transfer leases that are subject to our forbearance authority include leases involving common carrier services. Section 309(b) generally provides that applications involving transfers of substantial control are to be placed on public notice for at least 30 days in advance of being granted. *See* 47 U.S.C. § 309(b). Short-term *de facto* transfer leases are not, under existing policies, subject to this 30-day prior public notice requirement because the applications are processed under STA procedures set forth in Section 309(e); we note that, in this Second Report and Order, we replace the STA procedures used for short-term *de facto* transfer leases, as explained in Section IV.A.1.c, below.

[91] We have already determined, in the *Report and Order*, that a full 30-day public notice period is not required for any *de facto* transfer lease applications. *Report and Order* at ¶¶ 155-159 (reducing the public notice requirement to 21 days).

[92] *See* Craig O. McCaw, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5880-5881 ¶ 76 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *recon. in part*, 10 FCC Rcd 11786 (1995).

[93] *See Further Notice* at ¶ 271.

[94] *See Report and Order* at ¶¶ 32, 39-45; *see generally Secondary Markets Policy Statement*, 15 FCC Rcd 24178.

addition, spectrum leases approved under our forbearance authority will be placed on public notice, enabling members of the public and other interested parties to raise any concerns regarding the protection of consumers in petitions for reconsideration.

37. With respect to the third Section 10 criterion, we believe that forbearing from prior public notice and Commission review of qualifying *de facto* transfer spectrum leases will further the public interest. This process will enable parties entering into spectrum leasing arrangements that do not raise potential public interest concerns to put their business plans into effect with reduced regulatory delay and transaction costs. This will allow secondary markets to work more effectively, which in turn will increase the efficient use of spectrum, improve access to spectrum by all interested parties, promote competitive market conditions, and increase the innovative and advanced wireless services available to consumers. At the same time, the limitations on spectrum leases that qualify for forbearance are designed to ensure that the public interest and our fulfillment of our statutory obligations are not in any way undermined.

b. Immediate approval of certain categories of *de facto* transfer leases that are not subject to forbearance

(i) Background

38. As we noted in the *Further Notice*, Section 10 of the Act authorizes us to forbear from statutory and regulatory requirements only with respect to spectrum leases that involve telecommunications carriers and telecommunications services.[95] Even so, we stated our wish to provide similar streamlined processing for spectrum leases involving non-telecommunications carriers as we are providing for spectrum leasing transactions that fall within the scope of Section 10. Accordingly, we sought comment on whether and how the Commission could structure its review of spectrum leasing transactions involving non-telecommunications carriers or services in order to minimize possible delays in processing these transactions.[96]

(ii) Discussion

39. We will permit *de facto* transfer leases involving non-telecommunications providers and carriers, and thus are not eligible for Section 10 forbearance, to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance so long as the leasing parties can establish that the arrangements meet the same kinds of criteria as required for telecommunications providers.[97] These procedures comply with the statutory requirements of Sections 308, 309, and 310(d). In addition, our decision accords with commenters'

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[95] *Further Notice* at ¶ 275.

[96] *Id.* at ¶¶ 275-277. We also noted that, as a practical matter, many licenses that are beyond the scope of Section 10 are not subject to the statutory requirement of 30 days public notice prior to Commission approval, which applies only to common carrier and broadcast licenses. *See* 47 U.S.C. § 309(b). Section 310(d) does, however, require prior Commission review and approval of all transaction applications involving non-common carrier and non-broadcast licenses (just as it does for applications involving common carrier and broadcast licenses that are subject to our forbearance authority). *Further Notice* at ¶ 276; *see generally* 47 U.S.C. §§ 308, 309, 310(d).

[97] *See* paras. 15-28, *supra*.

support of our goal to streamline *de facto* transfer lease transactions involving non-telecommunications carriers in a manner similar to that adopted under the forbearance approach.[98]

40. Under the policies we are adopting, so long as the parties establish in their *de facto* transfer lease application – by provision of sufficient information and related certifications – that the spectrum lessee complies with the applicable eligibility, use, and foreign ownership-related requirements, and does not seek a waiver or declaratory ruling,[99] the Commission will immediately approve the application as consistent with statutory requirements and the public interest. As with *de facto* transfer lease applications filed under our forbearance approach, we will announce the grant of these *de facto* transfer leases involving non-telecommunications services in a weekly informational public notice, subject to reconsideration within 30 days by interested parties or the Bureau, and within 40 days by the Commission on its own motion.[100]

41. Streamlined processing of qualifying spectrum leases involving non-telecommunications services serves the public interest and is necessary in order to place substantively similar wireless spectrum leasing transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination. The policies and procedures we adopt are also consistent with the statutory requirements of Sections 308, 309, and 310(d). First, consistent with these provisions, we continue to require an application and approval process. In addition, in order to determine whether to approve these transactions, the Commission requires that each application establish a distinct set of facts and representations concerning the particular spectrum leasing transaction before it will be approved. Thus, before any particular spectrum lease application will be approved, the Commission will determine, based on the particulars of that application, that all of the criteria relevant to establishing that the public interest would be served by the granting of the application have been established, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

c. Applying the immediate approval procedures to short-term *de facto* transfer leases

(i) Background

42. Under procedures adopted in the *Report and Order*, short-term *de facto* transfer leasing arrangements are processed in the same manner as STAs authorized pursuant to Section 309(f) of the

[98] All of the comments we received on this issue supported our efforts to streamline spectrum lease transactions involving non-telecommunications carriers in the manner similar to what we are adopting under the forbearance approach. *See, e.g.*, Blooston Rural Carriers Comments at 12-13 (providing general support for the Commission's goals); Nextel Communications Comments at 7-9; WCA Comments at 13-15. One commenter recommended that the Commission take an approach similar to that it has taken for Section 214 applications. *See* WCA Comments at 13-15.

[99] *See* paras. 15-28, *supra*. Because licenses in non-telecommunications services generally are not auctioned, and thus would not implicate our designated entity or entrepreneur policies, we need not be concerned about restrictions and potential public interest concerns associated with these policies regarding spectrum leasing by designated entity or entrepreneur licensees. *See* para. 24. Similarly, because spectrum leasing in non-telecommunications services would not involve the kind of CMRS spectrum implicated by our competition policies (see the discussion in paras. 25-26, above), we are not concerned about potential public interest concerns relating to competition that would necessitate prior review of these spectrum leases.

[100] *See* para. 31, *supra*; *see also* 47 C.F.R. §§ 1.101 *et seq.* (rules relating to petitions for reconsideration of actions taken on delegated authority).

Communications Act.[101] Under these procedures, parties wishing to enter into short-term arrangements must establish through requisite certifications in their application that they qualify for these procedures and must also meet any additional requirements associated with our STA procedures. The Bureau then reviews the application and will act on the request within ten days if the specified conditions are met. A short-term lease can be for any term of up to 180 days; the parties may also renew the lease for any period of time up to another 180 days, but to do so they must submit another filing, subject to the same procedures.[102]

(ii) Discussion

43. We determine that short-term *de facto* transfer leasing arrangements should qualify for processing under the application/immediate grant procedures that we are adopting for qualifying long-term *de facto* transfer leases.[103] Accordingly, we determine to process these arrangements under the new procedures we are adopting, and we will no longer process them under the STA procedures.

44. Under the policies and rules adopted in the *Report and Order*, short-term *de facto* transfer leases do not raise potential public interest concerns relating to eligibility, use restrictions, or foreign ownership that would require either prior public notice or additional Commission review before being approved. In order to qualify to enter into short-term *de facto* transfer leases, spectrum lessees are already required, under existing policies, to meet the same eligibility and foreign ownership restrictions[104] that we have adopted above for determining whether a long-term *de facto* transfer lease qualifies for the application/immediate approval procedures. Short-term *de facto* transfer lease applicants must also certify that they would comply with certain applicable use restrictions.[105] In addition, we have determined that short-term *de facto* transfer leasing arrangements do not raise potential public interest concerns relating either to designated entity/entrepreneur or competition matters.[106] Accordingly, these issues do not prevent a short-term *de facto* transfer lease application from qualifying for the immediate approval procedures we are adopting herein.

45. Eliminating the requirement that short-term *de facto* transfer leases be processed under the procedures applicable to STAs enables us to remove unnecessary regulatory requirements and simplify the applicable rules. First, we will no longer require short-term lease applicants to include a public interest statement in accordance with the applicable rules derived from our STA procedures.[107] In

[101] *Report and Order* at ¶¶ 163-164, 181.

[102] *Id.* at ¶ 181.

[103] *See generally* Section IV.A.1.a, *supra*.

[104] *Report and Order* at ¶ 174.

[105] We note that for short-term *de facto* transfer leasing arrangements, certain eligibility and use restrictions applicable to long-term *de facto* transfer leasing arrangements do not apply. *See Report and Order* at ¶ 175.

[106] *See id.* at ¶¶ 176 (the designated entity and entrepreneur policies are not applied with respect to short-term *de facto* transfer leases), 178 (competition policies are not applied with respect to short-term *de facto* transfer leases).

[107] *See* 47 C.F.R. §§ 1.931(a)(1) (STA procedures for Wireless Telecommunications Services), 1.931(b)(3) (STA procedures for Private Wireless Services).

addition, we will no longer require that the term of a short-term *de facto* transfer lease be limited to 180 days and renewable for up to a total of 360 days. Instead, for purposes of administrative efficiency and general clarity, we will simplify the application requirements to do away with multiple filings, and to permit parties to enter into a short-term *de facto* transfer lease for a term of up to one year (365 days) by submitting a single application.[108]

d. Immediate processing of certain categories of spectrum manager leases

(i) Background

46. The *Report and Order* provided that parties entering into spectrum manager leases are required to file the leasing notification with the Commission within 14 days of when they execute the lease and at least 21 days prior to commencing operations (10 days prior if the lease is for one year or less).[109] We stated that this advance notification was included so as to allow the Commission and the public some opportunity to review the leasing arrangement prior to it going into effect.[110]

(ii) Discussion

47. Upon further consideration, we have decided to revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described in Section IV.A.1.a, above. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns – *i.e.*, those relating to eligibility, use restrictions, foreign ownership, designated entity/entrepreneur, or competition – we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, have made the necessary certifications to qualify for immediate processing, and have determined, through ULS, that the notification has been successfully processed.[111] These immediate processing procedures for spectrum manager leases will ensure parity in the regulatory treatment of spectrum manager and long-term *de facto* transfer leasing arrangements, thus eliminating unnecessary delay for parties seeking to enter into similar categories of spectrum manager leases and minimizing the possibility that our regulatory policies would be a factor in potential leasing parties' decision-making. Our determination also grants, in part, one party's petition for reconsideration, in which it sought elimination of unnecessary delay between the time

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[108] These short-term *de facto* transfer leases may be renewed so long as the combined term of the application and any renewal(s) does not exceed one year. We note that the remainder of the policies applicable to short-term *de facto* transfer leases, as set forth in the *Report and Order*, will remain in place for the reasons established therein. *See generally Report and Order* at ¶¶ 166-180.

[109] *Id.* at ¶ 124; *see also* 47 C.F.R. § 1.9020(e).

[110] *Report and Order* at ¶ 124.

[111] The spectrum leasing parties will be able to determine whether the notification has been successfully processed, through ULS, in the same manner they would determine whether a *de facto* transfer lease application has been approved, as set forth in para. 29, *supra*. Specifically, if the parties file a spectrum manager lease notification in ULS that establishes, through the information provided and related certifications, that they qualify for this processing method, ULS will reflect, on the next business day, that the notification was sufficiently complete and accepted for this processing on the basis of, and in reliance on, the information and certifications supplied. The spectrum lease notification will then be placed on public notice.

the licensee filed a spectrum manager lease notification and the time in which leasing parties could commence operation under the spectrum leasing arrangement.[112]

48. We adopt these similar policies for spectrum manager leases because the public interest concerns relating to these leases are either identical or similar to those associated with long-term *de facto* transfer leases. In particular, the policies relating to eligibility and use restrictions, foreign ownership, and competition apply with equal force, regardless of whether the spectrum lease is a spectrum manager lease or a long-term *de facto* transfer lease.[113] In addition, designated entity or entrepreneur licensees seeking to lease spectrum under spectrum manager leases are subject to certain restrictions associated with designated entity and entrepreneur policies, just as long-term *de facto* transfer leases are subject to certain restrictions.[114]

49. Accordingly, under the new policies we are adopting, if the spectrum manager lease satisfies the same qualifying elements as required for long-term *de facto* transfer leases as set forth in Section IV.A.1.a above[115] – and thus does not raise potential public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition – we do not believe it necessary to review these notifications in advance of operations, and the leasing parties are entitled to commence operations once they have received the requisite confirmation through ULS.[116] As with *de facto* transfer leases,[117] spectrum manager leases that proceed pursuant to these

[112] *See* First Avenue Networks Petition for Reconsideration at 1-4. First Avenue Networks asserted that it was capable of providing wireless broadband connections within three days of signing a lease and contended that the current rules unnecessarily delayed its prompt delivery of service to its customers. Accordingly, it recommended that we eliminate the requirement that the Commission be notified of spectrum manager leases days in advance of permitting parties to commence operations under the spectrum leasing arrangement. *See id.*

[113] *See Report and Order* at ¶¶ 109-11 (eligibility and foreign ownership requirements for spectrum manager leases), 112 (use restrictions for spectrum manager leases), 116-119 (competition policies relating to spectrum manager leases), 143 (eligibility and foreign ownership requirements for long-term *de facto* transfer leases), 144 (use restrictions for long-term *de facto* transfer leases), 147 (competition policies relating to long-term *de facto* transfer leases). We note that short-term *de facto* transfer leasing arrangements are not always subject to the same policies as spectrum manager leasing arrangements. With regard to these particular issues, short-term *de facto* leases are not subject to the same use restrictions or competition policies as spectrum manager leases. *Compare id.* at ¶¶ 112 (use restrictions applicable to spectrum manager leases) and 116-119 (competition policies applicable to spectrum manager leases) *with* ¶¶ 175 (exemption of short-term *de facto* transfer leases from certain use restrictions) and 178 (exemption of short-term *de facto* transfer leases from competition policies), respectively.

[114] *See id.* at ¶¶ 113 (spectrum manager leases), 145 (long-term *de facto* transfer leases). While these restrictions differ depending on whether a spectrum manager or long-term *de facto* transfer lease is involved, both types of spectrum leases trigger potential public interest considerations that warrant providing the Commission an opportunity to review the leases prior to commencement of operations.

[115] *See* Section IV.A.1.a, above.

[116] To the extent, however, that the spectrum manager leasing arrangements do not qualify for immediate processing because they potentially raise public interest concerns in any of these enunciated areas, then we believe it continues to be appropriate for the Commission and the public to have the opportunity to review the leases prior to parties commencing operations, consistent with the *Report and Order*. *See Report and Order* at ¶¶ 124-125. We also provide additional clarification regarding the Commission's opportunity to review these spectrum manager leases in the Order on Reconsideration, below. *See* Section V.B.1.a, *infra*.

[117] *See* paras. 30, 39, 43, *supra*.

immediate processing procedures are subject to post-notification review. Under these procedures, any interested party may file a petition for reconsideration within 30 days of the date of the public notice listing the notification as accepted.[118] Similarly, the Bureau will have 30 days from the public notice date, and the Commission 40 days, to reconsider whether the spectrum manager lease is in the public interest.

50. Finally, we determine to eliminate the requirement that parties file their spectrum lease notifications within 14 days of execution of their contractual agreement. We conclude that this requirement is superfluous so long as parties file the lease notification within the time frame required by our spectrum manager lease policies, either under the newly streamlined procedures adopted in this order (for qualifying spectrum manager leases) or at least 21 days in advance of commencing operations (10 days in advance if the lease is no longer than a year). Eliminating this requirement is consistent with the policies we are adopting, above, for *de facto* transfer leases; parties filing those applications are not required to file their spectrum leases with the Commission within 14 days of execution.

2. Extending Spectrum Leasing Policies to Additional Spectrum-Based Services

a. Background

51. In the *Further Notice*, we sought comment on whether the spectrum leasing policies should be extended to a variety of services that had been excluded from the spectrum leasing policies adopted in the *Report and Order*. In particular, we requested comment on whether such policies should be extended to the following services: Public Safety Radio Services (Part 90); Instructional Television Fixed Services (ITFS) (Part 74) and Multipoint Distribution Service (MDS) (Part 21); various other private wireless and Personal Radio Services, including certain Maritime services (Part 80),[119] Aviation services (Part 87), Personal Radio services (Part 95),[120] and Amateur services (Part 97); various services/authorizations in which frequencies are "shared"; and, miscellaneous other services, including non-multilateration Location and Monitoring Service (LMS) (Part 90), Cable Television Relay Service (Part 78), Multichannel Video Distribution and Data Service (MVDDS) (Part 101), 700 MHz Guard Band (Part 27), and satellite services (Part 25).[121]

b. Discussion

52. We determine that we will extend the spectrum leasing policies to some additional Wireless Radio Services, as identified below, but will not extend these policies to other services at this time, as explained herein.

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[118] This is the date in which the Bureau announces acceptance of the spectrum manager lease notification.

[119] We note that licensees in the VHF Public Coast services, Part 80 subpart J, already may enter into spectrum leasing arrangements under the *Report and Order*. *Report and Order* at ¶ 84; 47 C.F.R. § 1.9005(o).

[120] We have already permitted licensees in the 218-219 MHz Service, Part 95 subpart F, to enter into spectrum leasing arrangements under the *Report and Order*. *Report and Order* at ¶ 84; 47 C.F.R. § 1.9005(u).

[121] *See generally Further Notice* at ¶¶ 288-314.

53. *Public Safety Services.* With regard to the Public Safety Services in Part 90, we will permit public safety licensees with exclusive use rights[122] to lease their spectrum usage rights to other public safety entities and entities providing communications in support of public safety operations.[123] We, however, decline at this time to permit public safety licensees to enter into spectrum leasing arrangements for commercial or other non-public safety operations.

54. We will permit public safety licensees in these services to enter into spectrum leasing arrangements with other public safety entities and entities that provide communications in support of public safety operations, consistent with the policies we adopted last year in the *4.9 GHz Report and Order*. In that order, we established new licensing and service rules for the 4940-4990 MHz band (4.9 GHz band) that were designed to increase the effectiveness of public safety communications, foster interoperability, and further ongoing and future homeland security initiatives within the 4.9 GHz band.[124] We believed that these objectives would be best accomplished by basing the eligibility criteria for being licensed in the 4.9 GHz band on the "public safety services" definition set forth in section 90.523 of our rules,[125] which the Commission adopted in 1998 to implement Section 337(f)(1) of the Communications Act.[126] Under this definition, "public safety services" are services:

(A) the sole or principle purpose of which is to protect the safety of life, health, or property;

(B) that are provided – (i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a government entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public.[127]

Under this standard, nongovernmental organizations are eligible if they obtain written approval from a state or local government entity whose mission is the oversight or provision of public safety services.[128] Though we noted that utilities and pipelines were examples of potential licensees, we did not attempt to delineate every type of ncngovernmental organization that would be eligible to be licensed in the 4.9 GHz band; rather, we determined that traditional public safety entities are better poised to be most

[122] To the extent that licensees are sharing spectrum, they are not permitted to enter into spectrum leasing arrangements with other entities.

[123] In this section, we are only discussing public safety licensees authorized under Part 90 rules. *See* 47 C.F.R. Part 90 subpart B; § 90.311(a)(1)(i). We already permit Part 101 licensees (including public safety licensees) to lease spectrum under the rules adopted in the *Report and Order*. *See Report and Order* at ¶ 84 & n.181.

[124] *See* The 4.9 GHz Band Transferred from Federal Government Use, *Memorandum Opinion and Order*, 18 FCC Rcd 9152, 9158 ¶ 16 (2003) (*4.9 GHz Report and Order*).

[125] *Id.* at 9158-59 ¶ 16 (citing 47 C.F.R. § 90.523); *see also* 47 C.F.R. § 90.1203(a).

[126] 47 U.S.C. § 337(f)(1).

[127] 47 C.F.R. § 90.523.

[128] *4.9 GHz Report and Order*, 18 FCC Rcd at 9159 ¶ 17 (citing 47 C.F.R. § 90.523(a)).

knowledgeable about what other users and/or uses would be supportive of public safety operations.[129] We did, however, expressly require that use of the 4.9 GHz band by entities other than traditional public safety entities be in support of public safety, and prohibited communications with no nexus to the safety of life, health or property.[130]

55. For the same reasons that we decided to permit non-traditional public safety entities to be licensed in the 4.9 GHz band for use in support of public safety operations, we now conclude that it is appropriate to permit public safety licensees to lease spectrum for such use. In addition, we believe that our decision herein to permit spectrum leasing among public safety entities achieves an appropriate balance between commenters that supported extension of our spectrum leasing policies to these services and those that expressed concern about possible abuses.[131] Further, spectrum would not be used by commercial entities to the potential detriment of public safety operations. We believe that allowing public safety licensees to lease spectrum for use in support of public safety operations will help maximize the efficient use of spectrum among public safety entities by providing them incentives to lease any excess spectrum capacity, thus diminishing the likelihood that public safety entities will warehouse spectrum.[132]

56. Our decision at this time not to permit public safety licensees in our Public Safety Services to lease spectrum to entities other than public safety entities, or entities providing communications in support of public safety operations, is based on the record before us and reflects several concerns. Most commenters strongly objected to allowing public safety licensees to enter into spectrum leasing arrangements with commercial entities, contending that such leasing faced possible statutory barriers or could allow potential abuses without implementation of certain safeguards.[133] Two commenters also

[129] *Id.* at 9159-60 ¶¶ 17-19.

[130] *Id.* at 9162-63 ¶¶ 22-23.

[131] As noted above, two commenters supported providing public safety licensees additional flexibility to lease spectrum to other entities. *See* ITA Reply Comments at 9-10 (support for permitting public safety entities to lease spectrum to other entities eligible under private land mobile entities that are eligible under Part 90 services); St. Clair County Reply Comments at 2-3 (general support for permitting public safety entities to lease spectrum to commercial entities).

[132] Additionally, we note that applicable buildout requirements also act as constraints against spectrum warehousing. *See, e.g.*, 47 C.F.R. §§ 90.155(a), (b).

[133] *See* APCO Comments at 1-6; CTIA Comments at 4-5; SBC Comments at 13; Winstar Comments at 3; ITA Reply Comments at 9-10. For instance, one commenter representing public safety officials expressed "grave concerns" about potential harm that might result if public safety entities were to lease spectrum on a commercial basis. It pointed out possible significant statutory barriers to such leasing involving spectrum 700 MHz band on the grounds that Section 337 of the Act might effectively preclude making such spectrum commercially available. This commenter also was concerned that while most public safety entities would act responsibly when leasing spectrum, some agencies might by pressured by cash-strapped state and local governments to lease more and more spectrum capacity, potentially to the detriment of public safety operational requirements, or they could be become "fronts" for commercial entities. *See* APCO Comments at 1-6. Another commenter opposed leasing by public safety entities on the grounds that they might warehouse spectrum. *See* CTIA Comments at 4-5. Two commenters supported providing public safety licensees greater flexibility to lease spectrum to others. *See* ITA Reply Comments at 9-10 (support for permitting public safety entities to lease spectrum to other entities eligible under private land mobile entities that are eligible under Part 90 services); St. Clair County Reply Comments at 2-3 (general support for permitting public safety entities to lease spectrum to commercial entities).

proposed consideration of future technological developments and the possibility of requiring that any leased spectrum be subject to "interruptible use" capacities that would enable public safety licensees to immediately reclaim the use of any leased spectrum for public safety emergencies.[134] Since issuance of the *Further Notice* in this proceeding, we have released the *Cognitive Radio NPRM* seeking comment upon, among other things, technical issues relating to "smart" or cognitive radios that could enable implementation of "interruptible" spectrum leasing arrangements that could be used with regard to leasing of spectrum licensed to public safety entities.[135] As our next step in this area, we intend to consider the technical issues raised in that proceeding, which appear to be important groundwork in addressing broader public safety spectrum leasing.

57. *ITFS/MMDS services.* All of the comments received in this docket[136] were previously transferred to and considered in the *BRS/EBS Report and Order* in WT Docket No. 03-66, in which we comprehensively reviewed our policies and rules relating to the ITFS and MDS services.[137] In that order, we converted the MDS service into the Broadband Radio Service and the ITFS service into the Educational Radio Service,[138] and extended the secondary markets spectrum leasing policies to those services, but included certain modifications in order to maintain the educational purpose of ITFS.[139] We also grandfathered pre-existing "excess capacity" leasing arrangements that were entered into under the previous ITFS-specific leasing rules.[140]

58. *Maritime services.* Consistent with the spectrum leasing policies adopted in the *Report and Order*, we will extend the spectrum leasing rules to Automated Maritime Telecommunications Systems

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[134] One commenter recommended that any spectrum leasing of public safety channels should be subject to strict rules that ensure that the substantial majority of the public safety system is in fact used for public safety purposes, and that by public safety licensees can effectively reclaim the use of the spectrum, such as through newly developed cognitive radio capacity, when necessary. *See* APCO Comments at 1-6. Another commenter focused on possible future technological developments that would assist in developing appropriate leasing policies for public safety licensees, including "interruptible use" capacities that would enable public safety licensees to immediately reclaim the use of any leased spectrum for public safety emergencies. *See generally* WiNSec Comments.

[135] *See Cognitive Radio NPRM*, 18 FCC Rcd at 26878-26883 ¶¶ 51-67.

[136] We received comments from several parties on spectrum leasing involving the ITFS and MDS services. *See* BellSouth Comments at 6-10; National ITFS Association/Catholic Television Network Comments at 1-9 and Reply Comments at 1-3; SBC Comments at 12-13; Spectrum Market LLC Comments at 4-5; Sprint Comments at 4-6; WCA Comments at 1-8.

[137] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-145 (rel. July 29, 2004) (*BRS/EBS Report and Order*). As we noted in the *Further Notice*, there are unique policies associated with ITFS licensees' educational purposes, and the services have already developed their own approach to excess capacity leasing. *See Further Notice* at ¶¶ 307-08.

[138] *See generally BRS/EBS Report and Order.*

[139] *See id.* at ¶¶ 177-181.

[140] *See id.* at ¶ 181.

(AMTS) services in Part 80. As discussed by commenters that supported this extension,[141] the AMTS service involves a geographic licensing approach similar to another Part 80 service, VHF Public Coast stations, which also involves exclusive use licenses and already is permitted to enter into spectrum leasing arrangements under the leasing policies pursuant to the *Report and Order*.[142]

59. We do not, however, extend our spectrum leasing policies to any of our high seas public coast stations.[143] No commenters supported extending our spectrum leasing policies to these services, and they differ significantly from that of VHF Public Coast and AMTS stations. These frequencies are allocated internationally by the International Telecommunication Union (ITU) to facilitate interoperable radio communications among vessels of all nations and stations on land worldwide.[144] Flexible use is not permitted; instead, the ITU Radio Regulations specify how each frequency may be used (*i.e.*, for radiotelephone, radiotelegraph, facsimile, narrow-band direct printing, or data transmission).[145] In addition, unlike VHF Public Coast and AMTS stations, high seas public coast stations are not permitted to serve units on land.[146] Finally, high seas stations are licensed only on a site-by-site basis. The Commission declined to adopt a geographic licensing approach for this spectrum because of special considerations relating to the extensive international coordination required, the need to conform to changing international allocations and allotments, and the fact that some of the spectrum is shared with the Federal Government.[147]

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[141] We received comments from three parties that supported extending our spectrum leasing policies to the AMTS services. They asserted that to do so would be consistent with our earlier decision, in the *Report and Order*, to permit VHF Public Coast Station licensees to enter into spectrum leasing arrangements. *See* AMTA Comments at 3-4; Mobex Comments at 2-5; Paging Systems Reply Comments at 2-4.

[142] *Report and Order* at ¶ 84 & n.183. Also, we note that the Commission has previously stated that the licensing of incumbent site-based AMTS stations are akin to geographic licensing in many respects because the licensing of each system was tied to fixed geographic features (coastlines and waterways). *See* Regionet Wireless License, LLC, *Order*, 15 FCC Rcd 16119, 16122 ¶ 7 (2000).

[143] *See* 47 C.F.R. §§ 80.357(b), 80.361, 80.363(a)(2), 80.371(a)-(b).

[144] *See generally* Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6687 ¶ 4 (2002) (*Public Coast Fifth Report and Order*). We note, too, that while VHF Public Coast and AMTS stations use frequencies in the very high frequency band, high seas public coast stations use much lower frequencies, which enables them to serve vessels hundreds or even thousands of miles from land. *See generally id.*

[145] *See Public Coast Fifth Report and Order*, 17 FCC Rcd at 6710 ¶ 56, 6716-17 ¶ 75.

[146] *See* Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 17020 (1997); 47 C.F.R. § 80.123; *see also* Technology for Communications International, *Order*, 14 FCC Rcd 16173, 16176-77 ¶ 8 (WTB PSPWD 1999) (denying a request for a waiver to permit a high seas public coast station to serve units on land, and explaining that, because of the propagation characteristics of HF signals, interference to international communications is a possibility associated with service to units on land using HF frequencies not presented by VHF land mobile service).

[147] *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6711-12 ¶ 59, 6713-14 ¶¶ 64-66.

60. *MVDDS services.* We will extend our spectrum leasing policies to the MVDDS services consistent with the comments we have received.[148] We conclude that licensees will have similar "exclusive use" rights as other licensees to whom these policies currently apply,[149] and that the benefits of spectrum leasing should be made available to licensees and potential spectrum lessees in these services. Consistent with the service rules for these services,[150] which permit partitioning along county lines and prohibit disaggregation under any license authorization, we will permit MVDDS licensees to lease different geographic portions (divided along county borders) to eligible spectrum lessees,[151] but will permit only one entity, either the licensee or spectrum lessee, to operate in a given geographic area.[152]

61. *Services/authorizations involving shared frequencies.* We will not extend spectrum leasing to shared services at this time. As we noted in the *Further Notice*, we had previously declined to allow leasing on shared frequencies because parties can readily obtain access to the spectrum by obtaining their own authorizations on shared frequencies and they are not foreclosed from applying for authorizations by the existence of another licensee in the same geographic area.[153] Although we sought comment on whether there might nonetheless be reasons to extend spectrum leasing to shared services, commenters opposed extension of the leasing rules to services/authorizations involving shared frequencies services.[154]

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[148] *See* MDS America *Ex Parte* Comments at 2-4.

[149] *See Report and Order* at ¶ 84.

[150] Consistent with our general spectrum leasing policies, any spectrum leasing arrangement involving these services must comply with the underlying service rules.

[151] *See* 47 C.F.R. § 101.1412 (MVDDS eligibility restrictions for cable operators).

[152] The MVDDS service rules permit licensees to partition along county borders but prohibit spectrum disaggregation. *See* 47 C.F.R. §§ 101.1405, 101.1415. *See also* Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd., to Provide a Fixed Service in the 12.2-12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9685-9687 ¶¶ 180-184 (2002). The Commission limited partitioning to county lines because three ubiquitous services would be sharing the spectrum, in addition to point-to-point facilities that required protection, *id.* at 9686 ¶ 181, and it declined to permit disaggregation because the complexity and problems associated with effectively engineering and solving the potential interference problems, including difficulty in determining which licensee is causing interference problem, warrant keeping the number of licensees responsible and the number of total transmitters low to comport with the Commission's goal of promoting shared use of the band and protecting Direct Broadcast Service (DBS) operations. *Id.* at 9687 ¶ 184.

[153] *See Further Notice* at ¶ 305.

[154] Two parties commented on extending spectrum leasing to services/authorizations involving shared frequencies. Both opposed spectrum leasing in these services. One contended that there was no need for spectrum leasing since entities seeking access to spectrum in these bands can always come to the Commission and for a nominal fee obtain licenses involving available spectrum. *See* ITA Reply Comments at 7-8. Another urged that spectrum leasing not be extended to shared spectrum until progress had been achieved with regard to pending proceedings concerning refarming of these bands; it also expressed concern about the potentially complex frequency coordination processes that would ensue. *See* NAM/MRFAC Reply Comments at 3-6.

62. *Various Part 90 services.* We determine not to revise current spectrum leasing policies with regard to Part 90 services.[155] In particular, we will not extend these policies to Private Land Mobile Radio (PLMR) stations below 470 MHz (including those with "FB8" status). These stations share spectrum below 470 MHz, and while there is some degree of "exclusivity" (because the stations are trunked and cannot share in the usual way), the operations nonetheless are still on shared spectrum often occupied by others. Accordingly, we determine that, consistent with our current policies regarding shared services/authorizations, these stations should not be included among those services to which the spectrum leasing policies apply. In addition, we do not extend our spectrum leasing policies to non-multilateration LMS services because licensing in these services is shared and non-exclusive. Entities seeking access to spectrum for these non-multilateration LMS uses can gain access to spectrum without the need to enter into spectrum leasing arrangements with licensees.

63. *Other services.* We decline, at this time, to extend the spectrum leasing policies to any additional services on which we had sought comment, including the 700 MHz Guard Band Service, Amateur Services, Personal Radio Services, Aviation Services, Cable Television Relay Services, and satellite services.[156]

64. We do not believe it appropriate to extend the spectrum leasing policies adopted in the *Report and Order* to the Guard Band Manager Service. This service already has its own distinct set of policies and rules regarding leasing arrangements, and no commenters proposed replacing those policies. Accordingly, we see no reason at this time to replace those policies at this time. Nor do we extend spectrum leasing policies to the Part 97 Amateur Radio Services. An individual Amateur Radio licensee gains access to particular bands of spectrum after obtaining an operator license by successfully completing the relevant exam requirements for those particular bands.[157] The amateur licensee must share access to the spectrum with all amateur operators who have also successfully passed examinations for the same privileges. Thus, an amateur licensee has no exclusive use rights with regard to the spectrum that it can lease to others. Moreover, a new Amateur Radio applicant is not precluded from applying for an authorization by the existence of another licensee in the same geographic area. We also do not extend our spectrum leasing policies to additional services among the Part 95 Personal Radio Services. Apart from the 218-219 MHz service (to which spectrum leasing policies already apply[158]), the

[155] We received two comments pertaining to spectrum leasing in our Part 90 services. One commenter requested that the Private Land Mobile Radio (PLMR) stations below 470 MHz with "FB8 status" should be included among those services permitted to enter into spectrum leasing arrangements. It contended that this would be consistent with the inclusion, in the *Report and Order*, of the Part 90 services above 470 MHz. *See* ITA Reply Comments at 7-10. As noted by ITA, we included the Part 90 services about 470 MHz among the services permitted to lease spectrum under the policies adopted in the *Report and Order*. *Report and Order* at ¶ 84 n.181; 47 C.F.R. § 1.9005(t). In addition, it recommended that B/ILT licensees should be able to lease to public safety entities.[155] ITA Reply Comments at 9. The other commenter opposed any revisions that would allow Business and Industrial/Land Transportation (B/ILT) licensees to lease to commercial entities, expressing concern about potential harmful interference. *See* Boeing Reply Comments at 2-6.

[156] One commenter recommended extending our spectrum leasing policies to these services, but provided no rationale for so doing. *See* Winstar Comments at 2.

[157] *See* 47 C.F.R. §§ 97.501, 97.101(b); *see also Further Notice* at ¶ 301.

[158] We note that the *Report and Order* permitted spectrum leasing by one Personal Radio Service, the 218-219 MHz service, in which licensees have exclusive use of the licensed spectrum. *See Report and Order* at ¶ 84 & n.183.

Personal Radio Services are either licensed by rule and/or operate on shared spectrum. For example, Citizens Band Radio operators are authorized by rule to operate without individual licenses on any of 40 channels nationwide (choosing one at a time).[159] Radio Control operators are authorized by rule to operate without individual licenses on any of the radio control channels nationwide.[160] A General Mobile Radio Service (GMRS) operator must obtain a license, but operates on twenty-three frequencies nationwide. Thus, whether licensed by rule and/or operating on shared spectrum, Part 95 licensees do not have exclusive spectrum rights to lease to others,[161] and entities seeking to gain access to such spectrum can readily do so without the need to enter into spectrum leasing arrangements with existing licensees.

65. Nor do we extend our spectrum leasing policies to our Part 87 Aviation Services. No commenter proposed that the spectrum leasing policies be applied to these services. In addition, most of the spectrum in these services is licensed on a shared basis, and thus is not assigned for the exclusive use of any particular licensee.[162] Finally, aviation safety concerns among the Aviation Services that do involve exclusive use rights – *i.e.*, aeronautical advisory stations (unicoms) at uncontrolled airports[163] and aeronautical enroute stations[164] – recommend against extending our spectrum leasing policies to these services. In particular, the Commission has determined that the licensees in these services should, for aviation safety purposes, be limited to one operator at any one location.[165] Accordingly, we will not permit licensees to lease spectrum usage rights to other entities.

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[159] *See* 47 C.F.R. Part 95 subpart D.

[160] *See* 47 C.F.R. Part 95 subpart C.

[161] *See* 47 C.F.R. §95.7(a) (General Mobile Radio Service).

[162] 47 C.F.R. § 87.41(b). We note that automatic weather observation station, automatic surface observation station, and automatic terminal information station operate on a shared basis, not on an exclusive use basis. While only one automatic weather observation station, automatic surface observation station, or automatic terminal information station will be licensed at an airport, these stations do not operate on dedicated spectrum, but instead generally are assigned frequencies available for air traffic control operations. 47 C.F.R. §§ 87.527(c), 87.529.

[163] Unicom transmissions are limited to the necessities of safe and expeditious operation of aircraft. *See* 47 C.F.R. § 87.261(a). "Uncontrolled airports" are those that do not have a control tower, a control tower remote communications outlet, or an FAA flight service station that effectively controls traffic at that airport. 47 C.F.R. § 87.215(b); *see also* Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service, *Report and Order and Further Notice of Proposed Rule Making*, 18 FCC Rcd 21432, 21459-60 n.211 (2003) (*Part 87 Report and Order*).

[164] 47 C.F.R. § 87.213(b). Aeronautical enroute stations provide operational control communications to aircraft along domestic or international air routes. *See* 47 C.F.R. § 87.261(a). Operational control communications include the safe, efficient and economical operation of aircraft, such as fuel, weather, position reports, aircraft performance, and essential services and supplies. Public correspondence is prohibited. *Id.*

[165] At uncontrolled airports, unicoms (which are assigned only one frequency) are often the only available source of critical safety-related information regarding runway, wind, or weather conditions. *See* 47 C.F.R. § 87.217(a); *Part 87 Report and Order*, 18 FCC Rcd at 21460 ¶ 56. The Commission limits unicoms to one-per-uncontrolled-airport for safety reasons. *See* Amendment of Part 87 of the Rules to Provide a Summary Procedure for Processing Mutually Exclusive Applications in the Aviation Services, *Order*, 60 Rad. Reg. 2d 251, at ¶ 2 (1986). As for aeronautical enroute stations, large trunk air carriers use these stations to maintain reliable (continued….)

66. Finally, we do not extend our spectrum leasing policies applicable to Wireless Radio Services to two services, the Cable Television Relay Service and satellite services, that are administered by bureaus outside of the Wireless Telecommunications Bureau. No commenters proposed extending the spectrum leasing policies to these two services, and the general policies applicable to these two services differ, in many respects, from those administered by the Wireless Bureau.[166] Accordingly, we will not extend our spectrum leasing policies to these two services at this time.

3. Spectrum Leasing Policies Applicable to Designated Entity/Entrepreneur Licensees

a. Background

67. In the *Report and Order*, we decided that designated entity and entrepreneur licensees would be permitted to enter into a spectrum manager lease with any qualified lessee, regardless of the lessee's designated entity or entrepreneur eligibility, and avoid the application of our unjust enrichment rules and transfer restrictions, so long as the lease did not result in the lessee's becoming a "controlling interest" or affiliate of the licensee that would cause the licensee to lose its designated entity or entrepreneur eligibility under section 1.2110 of our rules.[167] We further determined that, to the extent that any conflict arose between the revised *de facto* control standard for spectrum leasing arrangements as set forth in the *Report and Order* and the controlling interest standard in our rules for determining designated entity and entrepreneur eligibility, we would apply the latter in determining whether the licensee had maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments.[168] We also decided in the *Report and Order* that designated entity and entrepreneur licensees would be allowed to enter into long-term *de facto*

(Continued from previous page)
communications between each aircraft and the appropriate dispatch office, while small airlines and large commercial aircraft operators use them to maintain flight-following systems. *See generally Part 87 Report and Order*, 18 FCC Rcd at 21441 ¶ 17. The Commission recently reviewed its aeronautical enroute station licensing rules, and concluded that the public interest, including aviation safety, is best served by authorizing only one operator at a location. *See id.* at 21442-43 ¶¶ 22-23.

[166] We also note that there already exists a robust secondary market for parties seeking to gain access to spectrum in our satellite services. We adopted rules to encourage the development of a secondary market for certain satellite operators in the *First Space Station Reform Order*. *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, 18 FCC Rcd 10760 (2003) (*First Space Station Reform Order*). In that order, we adopted a procedure applicable to non-geostationary orbit (NGSO) and geostationary orbit, mobile satellite service (GSO MSS) satellite system operators under which the Commission issues licenses by dividing the available spectrum equally among the qualified applicants in a processing round. *See id.* at 10776 ¶ 29. We also eliminated the anti-trafficking rule for satellite operators to enable NGSO and GSO MSS licensees to buy and sell spectrum to each other in a secondary market after licenses are issued. We noted that secondary markets can provide benefits to satellite users and consumers not only through the outright transfer of licenses, but also through partial redistribution or transfer of unused spectrum. By encouraging satellite licensees to sell unused spectrum to other parties willing to put the spectrum into use, we allow parties flexibility to transfer satellite bandwidth to more efficient uses in response to changing market conditions and consumer demands, and we allow marketplace forces to determine which companies succeed. *Id.* at 10842-43 ¶ 218 (citing *Secondary Markets Policy Statement*, 15 FCC Rcd at 24182 ¶ 11).

[167] *Report and Order* at ¶ 113; 47 C.F.R. § 1.9020(d)(4); *see id.* § 1.2110(b), (c). In this context, the term "entrepreneur" refers to an entity eligible to hold certain broadband personal communications services C and F block licenses won in closed bidding. *See id.* §§ 1.2110 and 24.709.

[168] *Report and Order* at ¶ 113; 47 C.F.R. § 1.9020(d)(4).

transfer leasing arrangements subject to any existing transfer restrictions and unjust enrichment payment obligations.[169]

68. In the *Further Notice*, we inquired whether we should alter the *de facto* transfer leasing policies adopted in the *Report and Order* and allow a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same eligibility status as that of the licensee.[170] We sought comment on how, if such a policy change were made, we could ensure continued compliance with our statutory obligations to prevent unjust enrichment.[171] We also sought comment on whether to use the new *de facto* control standard, rather than the existing controlling interest standard (including the *Intermountain Microwave* criteria[172]), when evaluating affiliation and eligibility for designated entity and entrepreneur benefits.[173] We specifically asked whether this latter change would be consistent with the statutory objectives of Section 309(j).[174]

b. Discussion

69. *Affirmation of existing rules.* We affirm the rules we established in the *Report and Order* for spectrum leasing by designated entity and entrepreneur licensees, declining requests that we provide such licensees with the unfettered right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs. As we explain below, our decision means that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of designated entity and entrepreneur eligibility. However, in response to suggestions that we clarify these rules, we provide additional guidance regarding their application.

70. We decline to adopt the suggestion of some commenters (one of which is also a petitioner) that we allow designated entity and entrepreneur licensees to lease spectrum to any entity, without regard to how the spectrum lease might affect the licensee's designated entity or entrepreneur eligibility.[175] We

[169] *Report and Order* at ¶ 145.

[170] *Further Notice* at ¶ 323.

[171] *Id.*

[172] *See Intermountain Microwave*, 12 FCC 2d 559 (1963); *see also Report and Order* at ¶¶ 3, 10, 60; Matter of Amendment of Part 1 of the Commission's rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15324 ¶ 61 (2000) (*Part 1 Fifth Report and Order*).

[173] *Further Notice* at ¶ 317.

[174] *Id.*

[175] *See* AT&T Wireless Comments at 8-9; Cingular Wireless Comments at ii, 2-4, 6-8; Cingular Wireless Petition at 2-4; Salmon PCS Comments at 8-11; *see also* Blooston Comments at 2-5 (Commission should allow "small business licensees [to] lease their spectrum without jeopardizing eligibility status or entitlement to bidding credits if the spectrum user actually provides service to a rural area"); Council Tree *Ex Parte* Comments at 14-17 (Commission should lift unjust enrichment repayment obligations and entrepreneur transfer restrictions, if not for all long-term *de facto* transfer leasing arrangements, then "for entities owned and controlled by Alaska Native Corporations or Indian tribes when rural area spectrum rights are involved"); Salmon PCS Petition Reply Comments at 9-14. In declining to adopt the suggestions proffered by these parties, we specifically are denying Cingular Wireless' petition for reconsideration on these issues.

believe that adopting such a change to our rules would contravene the requirements and objectives of Section 309(j) of the Act.[176] Section 309(j) requires, among other things, that the Commission ensure that small businesses are given the opportunity to participate in the provision of spectrum-based services and that, to further this goal, it consider the use of bidding preferences.[177] These statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service.[178] In such a way, Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers.[179]

71. Section 309(j) also directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment.[180] If we were to allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee had acquired an attributable interest in the licensee, we would run the risk that designated entity and entrepreneur incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent. While one commenter argues that "[t]here is no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market – construction and operation of a facilities-based network[,]"[181] the legislative history of Section 309(j) indicates otherwise. There, Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter "participation in the licensing process by those who have no intention of offering service to the public."[182] While we believe that spectrum leasing by small businesses serves many policy goals, we cannot disregard Congress' stated intent that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license.

72. We also reject recommendations that we allow licensees to avoid unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the spectrum lease to serve rural areas.[183] Only one commenter attempts to explain why such a recommendation would not be contraindicated by concerns about unjust enrichment, claiming that the Commission's "statutory obligations of ensuring the participation of rural telephone companies in the provision of advanced

[176] 47 U.S.C. § 309(j).

[177] *Id.* § 309(j)(4).

[178] *See* H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

[179] *See* 47 U.S.C. § 309(j)(3).

[180] *Id.* § 309(j)(4)(E); *see also id.* § 309(j)(3)(C).

[181] *See* AT&T Wireless Comments at 9.

[182] H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

[183] *See* Blooston Rural Carriers Comments at 3-5; Council Tree *Ex Parte* Comments at ii, 3, 14-17; RTG Comments at 5-7.

telecommunications services and ensuring the rapid deployment of new technologies, products or services for the benefit of the public, including those residing in rural areas, outweigh any risk of unjust enrichment."[184] The premise of that claim – that the Commission is statutorily required to ensure both the rapid deployment of service to rural areas and the participation of rural telephone companies in the provision of advanced telecommunications services – is not supported by Section 309(j) of the Act and has been explicitly rejected by the U.S. Court of Appeals for the D.C. Circuit.[185] Rather, Section 309(j) requires that the Commission "seek to promote," as one of many, sometimes conflicting goals, the objective that service be developed and rapidly deployed to rural customers,[186] and requires further that the Commission ensure that rural telephone companies be given the "opportunity" to participate in the provision of spectrum-based services.[187]

73. To facilitate these ends within the context of competitive bidding, the Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides, while specifically declining to establish an independent bidding credit for large telephone companies serving rural areas.[188] When initially considering whether to create a separate bidding credit for rural telephone companies, the Commission determined that telephone companies providing service in rural areas do not *per se* have the same difficulty accessing capital as other groups, such as small businesses.[189] In subsequent decisions considering this issue, the Commission has not changed its determination.[190] If we provided small businesses and entrepreneurs with the unrestricted ability to enter into spectrum leasing arrangements with non-eligible entities planning to serve rural areas, without regard to our eligibility rules, we would, in effect, be allowing small business and entrepreneur incentives to benefit, indirectly, the very entities which we had expressly found no basis for assisting in that fashion in the primary

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[184] *See* Blooston Rural Carriers Comments at 5.

[185] *Melcher v. FCC*, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998).

[186] 47 U.S.C. § 309(j)(3)(A).

[187] *Id.* § 309(j)(4)(D).

[188] *See* Reallocation and Service rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1090-91, n.505 and accompanying text (2002); *see also* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9664-65 ¶ 176 (1995).

[189] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 457-58 ¶ 100 (1994).

[190] *See, e.g.*, Amendment of the Commission's rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR docket No. 93-253, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476-77 ¶ 41 (2000); Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16968-69 ¶ 81; *see also Part 1 Fifth Report and Order*, 15 FCC Rcd at 15320-21 ¶ 52; Revision of Part 22 and Part 90 of the Commission's rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091-92 ¶ 114 (1999).

market.[191] We, of course, remain committed to promoting access to competitive advanced telecommunications services in rural and underserved areas and note that we have adopted other methods of facilitating such access in our *Rural Report and Order*.[192]

74. For similar reasons, we also reject a suggestion that we lift unjust enrichment repayment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes that lease rural area spectrum rights to non-eligible entities pursuant to long-term *de facto* transfer leasing arrangements.[193] Indian tribes and Alaska Regional or Village Corporations already enjoy enhanced access to designated entity and entrepreneur benefits through an exclusion from our affiliation rules available only to them.[194] Again, were we to permit such entities to enter into long-term *de facto* transfer leases without being subject to unjust enrichment obligations or entrepreneur transfer restrictions, we would effectively be allowing them to transfer these benefits to spectrum lessees that would not be able to qualify for the benefits in the primary market, and particularly not on such an enhanced basis. While we decline to adopt this specific recommendation, we note that we are considering various measures in our Tribal Lands proceeding to foster the extension of wireless telecommunications service to tribal lands.[195]

75. To summarize, in affirming our rules and in declining to adopt proposals to the contrary, we have determined that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of whether a licensee undertaking a lease has maintained its designated entity and/or entrepreneur eligibility. We, nonetheless, recognize that further guidance on the application of those rules in the context of leasing might be useful. Accordingly, we offer such guidance below.

76. *Application of Existing Attribution Rules to Spectrum Manager Leasing Arrangements.* In response to requests from two commenters (one of which is also a petitioner),[196] we clarify here how our attribution rules, including the *Intermountain Microwave* criteria, are applied in determining whether

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[191] Our reasoning here applies equally to spectrum manager and long-term *de facto* transfer leasing arrangements.

[192] *See generally Rural Report and Order.* We further note that we recently facilitated licensing to rural telecommunications companies by modifying our controlling interest and attribution rules for rural telephone cooperatives. *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10180, 10186-95 ¶¶ 10-20 (2003); 47 C.F.R. § 1.2110(b)(3)(iii).

[193] *See* Council Tree *Ex Parte* Comments at ii, 3, 14-17.

[194] *See* 47 C.F.R. § 1.2110(c)(5)(xi) ("*Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations . . . or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entitles, and that otherwise complies with the requirements of this section. . . ."). Further, we offer a separate bidding credit to licensees that serve qualifying tribal lands. *Id.* § 1.2110(f)(3).

[195] *See* Extending Wireless Telecommunications Services to Tribal Lands, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775 (2003).

[196] *See* Cingular Wireless Comments at 7-8; Cingular Wireless Petition at 3-4; Salmon PCS Comments at 4-5, 8.

spectrum manager leasing arrangements by designated entity and entrepreneur licensees satisfy our eligibility requirements. We note, as a preliminary matter, that we expect a licensee to conduct an analysis of possible control by, or affiliation with, the proposed spectrum lessee before entering into a spectrum manager leasing arrangement and before certifying that the spectrum lease does not affect the licensee's continued designated entity or entrepreneur eligibility.[197] That analysis should take into account the Commission's definitions of control and affiliation, which will help to determine, as they do in non-spectrum leasing contexts, whether the gross revenues (and, in the case of entrepreneurs, the total assets) of a spectrum lessee are to be attributed to a designated entity or entrepreneur licensee.[198] Such a determination will be made by evaluating the licensee's Commission-regulated business in the context of a spectrum lessee's involvement with the licensee. For example, a spectrum lessee would become an attributable interest holder in the licensee if the lessee were to become an officer or director of the licensee.[199] An attributable affiliation might also be created if a lease called for the licensee and spectrum lessee "to combine their efforts, property, money, skill and knowledge."[200] Similarly, a spectrum lease might create a contractual affiliation between licensee and spectrum lessee if the leasing arrangement represented a significant portion of the licensee's day-to-day business operations.[201] While one commenter suggests that a licensee can preserve its designated entity or entrepreneur eligibility simply by maintaining day-to-day control over a spectrum leasing business,[202] we believe that, in order to satisfy the requirements of Section 309(j) of the Act and avoid unjust enrichment obligations or transfer restrictions, the licensee cannot make spectrum leasing its primary business and must, as discussed above, continue to provide facilities-based network services under its licenses.

77. In examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease.[203] Referring to an example provided by one commenter,[204] we conclude that a spectrum manager lease between a designated

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[197] Each licensee notifying the Commission about a spectrum manager lease involving a license still subject to entrepreneur transfer restrictions or potentially subject to unjust enrichment obligations must certify that the lease does not affect the licensee's continuing eligibility to hold a license won in closed bidding or to retain bidding credit or installment payment benefits. *Report and Order* at ¶ 113; *see generally* 47 C.F.R. § 1.9020(e). The Commission retains the right to investigate the veracity of such certification, post-notification, and to terminate a spectrum manager leasing arrangement if it determines that the arrangement raises significant public interest concerns. *Report and Order* at ¶ 12; 47 C.F.R. § 1.9020(f).

[198] *See* 47 C.F.R § 1.2110(c)(2), (c)(5).

[199] *See id.* § 1.2110(c)(2)(ii)(F).

[200] *See id.* § 1.2110(c)(5)(x).

[201] *See id.* § 1.2110(c)(5)(ix).

[202] Salmon PCS Petition Reply Comments at 10-11; *see also* AT&T Wireless Comments at 9.

[203] We remind licensees that a change in that relationship subsequent to filing the spectrum manager lease notification could also adversely affect their ongoing eligibility for entrepreneur or designated entity benefits.

[204] Salmon PCS Petition Reply Comments at 6-8.

entity or entrepreneur licensee and a non-designated entity/entrepreneur spectrum lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible.[205] On the other hand, a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved.

78. While we direct licensees to continue to rely on our existing attribution rules to determine whether a proposed spectrum manager leasing arrangement would affect their continuing eligibility for designated entity or entrepreneur benefits, we recognize that certain of our affiliation criteria do not contemplate spectrum leasing and are therefore incompatible with spectrum manager leasing arrangements. For instance, under our attribution rules, affiliation generally arises where another entity shares office space, employees, or other facilities with a designated entity or entrepreneur licensee and, through these sharing arrangements, gains control or potential control of the licensee.[206] In addition, under *Intermountain Microwave*, one indication of affiliation is the use by another entity of the licensee's facilities and equipment.[207] However, because spectrum leasing arrangements, by their very nature, always involve the spectrum lessee's construction or use of facilities in the licensee's service area and/or operation of those facilities over the licensee's bandwidth, it would be unworkable to apply our facilities-related indicia of affiliation in the customary manner to spectrum leasing situations. We clarify, therefore, that a spectrum lessee's construction or use of facilities in the licensee's service area or over its bandwidth does not, by itself, transform the lessee into a controlling interest or affiliate of the licensee.[208] On the other hand, joint use of office space, employees, or equipment or other facilities by the licensee and the spectrum lessee might indicate affiliation and would require an analysis of whether the spectrum lessee would, through such use, acquire control or potential control of the licensee.

79. Likewise, we clarify that the existence of spectrum manager leasing arrangement does not, by itself, create an "identity of interest" between the licensee and lessee resulting in an attributable affiliation under section 1.2110(c)(5)(i)(D).[209] However, every designated entity or entrepreneur licensee should take care to examine, and we will continue to review, whether there is an identity of interest between the licensee and its spectrum lessee beyond the mere existence of the spectrum lease that confers attributable affiliation under our rules. For example, members of the same family or entities with

[205] We note that even a spectrum manager lease between two designated entities or entrepreneurs might give rise to questions of eligibility, if affiliation between the licensee and spectrum lessee were the result.

[206] 47 C.F.R. § 1.2110(c)(5)(viii).

[207] *Intermountain Microwave*, 12 FCC 2d 559 (1963); *see Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating the *Intermountain Microwave* principles of control into section 1.2110 of the Commission's rules).

[208] We clarify further that the licensee need not exert facilities-based control over the leased operations in order to maintain its designated entity or entrepreneur eligibility, except to the extent required by the *de facto* control standard for spectrum leasing arrangements. *See Report and Order* ¶ 65; 47 C.F.R. § 1.9010.

[209] *See* 47 C.F.R. § 1.2110(c)(5)(i)(D).

common investments should be considered affiliates and treated, for purposes of attribution, as one person or entity.[210] Similarly, we clarify that a spectrum manager leasing arrangement does not, *per se*, constitute a management agreement or joint marketing arrangement resulting in the spectrum lessee's being considered a controlling interest of the licensee under sections 1.2110(c)(2)(ii)(H)-(I).[211] We, nonetheless, caution designated entities and entrepreneurs that specific provisions in spectrum manager leasing arrangements, or other agreements with their spectrum lessees, might constitute management agreements or joint marketing arrangements. As our rules state, "affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control or potential control, of the other concern."[212]

80. When entering into a spectrum manager leasing arrangement, the licensee must retain both *de jure* and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard. Consistent with this requirement, a designated entity or entrepreneur licensee cannot use this spectrum leasing vehicle to circumvent our attribution rules. The designated entity or entrepreneur must, if it wishes to undertake a spectrum manager lease, preserve its existing eligibility. As we have discussed, to do so, the designated entity or entrepreneur must evaluate and certify that nothing concerning its spectrum manager lease alters its ongoing eligibility for the benefits it has received. Leasing arrangements that would create a controlling interest or attributable affiliation that altered the designated entity or entrepreneur licensee's eligibility are prohibited. In lieu of using a spectrum manager leasing arrangement in such a situation, designated entities or entrepreneurs are free to undertake a *de facto* transfer lease, subject to the Commission's unjust enrichment requirements and any applicable transfer restrictions.[213] While an attributable interest analysis will not provide licensees with the complete certainty that two commenters desire (one of which is also a petitioner),[214] it is an analysis with which all designated entity and entrepreneur licensees should be familiar. Such an analysis is required whenever an auction applicant seeks designated entity or entrepreneur eligibility, or when a designated entity or entrepreneur licensee applies for license grant or to assign or transfer control of its authorization.

81. These clarifications should serve to allay the concern expressed by two commenters (one of which is also a petitioner) that our *Report and Order* might be interpreted as limiting designated entities and entrepreneurs to entering into spectrum manager leases only with other designated entities and entrepreneurs because we stated that "[u]nder spectrum manager leasing, we [would] require that spectrum lessees satisfy the eligibility and qualification requirements that are applicable to licensees under their authorization."[215] While the language could conceivably refer to our eligibility requirements for designated entity and entrepreneur eligibility rather than to the general eligibility requirements in

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[210] *See id.* § 1.2110(c)(5)(iii).

[211] *Id.* § 1.2110(c)(2)(ii)(H)-(I).

[212] *Id.* § 1.2110(c)(5)(ix).

[213] *See Report and Order* at ¶ 145.

[214] *See* Cingular Wireless Comments at 13-14; Salmon PCS Comments at 4-5, 7-8; *see also* Cingular Wireless Petition at 2-3. To the extent the clarification we provide herein is not consistent with the clarification sought by Cingular Wireless in its petition for reconsideration, we deny that petition.

[215] *See* Cingular Wireless Comments at 4-5 (citing *Report and Order* ¶ 109); Cingular Wireless Petition at 4-6; Salmon PCS Petition Reply Comments at 8. The language of paragraph 109 of the *Report and Order* is reproduced with a few stylistic changes at section 1.9020(d)(2)(i). *See* 47 C.F.R. § 1.9020(d)(2)(i).

section 1.9020 of our rules, as one commenter acknowledges, "[i]t is clear from the context that the Commission was referring to these general eligibility requirements… ."[216] Nevertheless, to avoid any possibility of confusion, we will also amend the language of our rules to clarify that, subject to the other eligibility restrictions set forth in the *Report and Order* and in section 1.9020(d) of our rules, including those discussed above, a designated entity or entrepreneur licensee may enter into a spectrum manager leasing arrangement with any spectrum lessee, regardless of the lessee's eligibility for designated entity or entrepreneur benefits.[217]

82. *Application of Controlling Interest Standard to Designated Entity and Entrepreneur Eligibility Determinations*. Insofar as we have determined to continue to rely upon our existing attribution rules (including our definitions of controlling interest and affiliation) as well as existing Commission precedent for all determinations of designated entity and entrepreneur eligibility, we decline to follow recommendations that we should instead rely on the new *de facto* control standard adopted for leasing for our eligibility determinations.[218] While three parties opine that application of the controlling interest standard will significantly limit the flexibility of designated entities and entrepreneurs to enter into leasing agreements;[219] only one of these parties specifically responds to our question asking whether extending the *de facto* control standard for spectrum manager leases to all evaluations of affiliation and eligibility for designated entity and entrepreneur status would be consistent with the objectives of Section 309(j).[220] That party, as noted above, suggests that designated entities need not be limited to constructing and operating a facilities-based network in order to satisfy Congress' objective that they participate in the spectrum market.[221] We cannot accept that reading of Section 309(j). As we have earlier explained, Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.[222]

[216] Cingular Wireless Comments at 5; Cingular Wireless Petition at 4-5.

[217] *See* 47 C.F.R. § 1.9020(d)(4), as amended in Appendix C herein. Because the clarification we provide herein is partially consistent with the recommendation for clarification made by Cingular Wireless in its petition for reconsideration, we grant that petition in part on this issue.

[218] *See* AT&T Wireless Comments at 7-8; Cingular Wireless Comments at iii, 1, 12-14; Salmon PCS Comments at 8-11.

[219] *See* AT&T Wireless Comments at 8-9; Cingular Wireless Comments at 7-8; Salmon PCS Comments at ii, 4, 8, 10; Salmon PCS Petition Reply Comments at 9-11.

[220] *See* AT&T Wireless Comments at 9.

[221] *Id.*

[222] *See* H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

4. Application of the *De Facto* Control Standard for Spectrum Leasing with regard to Other Issues and Types of Arrangements

a. Background

83. In the *Report and Order*, we limited the application of the revised *de facto* control standard to the context of spectrum leasing arrangements,[223] while leaving in place the existing *de facto* control tests – including those based on *Intermountain Microwave* and other facilities-based analyses – for designated entity and entrepreneur eligibility issues, management agreements, and other similar types of agreements. We sought comment on whether and how the revised *de facto* control standard should be extended to apply in these and any other contexts.[224]

b. Discussion

84. Based on the record before us,[225] we decline in this proceeding to extend the revised *de facto* transfer standard applicable to spectrum leasing arrangements to other types of arrangements outside the context of spectrum leasing. Although commenters supported applying the revised standard more broadly, there are significant legal and practical difficulties that commenters have failed to address. It is not clear from the sparse record how such a change would affect existing rules and policies relating to management agreements or other spectrum transactions, or what benefits would be achieved, and we are concerned that revising our rules in these areas may cause a host of unintended consequences or ambiguities.

B. Policies to Facilitate Advanced Technologies

1. Background

85. In the *Further Notice*, we observed that the *Secondary Markets Policy Statement* and the *Spectrum Policy Task Force Report* emphasized the benefits of "smart" or "opportunistic" technologies, especially the potential for increased access to unused spectrum.[226] In addition, the *Spectrum Policy Task Force Report* and the Commission's recently issued *Cognitive Radio NPRM* on the use of advanced technologies describe how they may enable devices to search across many bands, sense the level of emissions, and then operate in spectrum that is either not in use by other parties or below a certain level

[223] *Report and Order* at ¶¶ 51-53.

[224] *Further Notice* at ¶¶ 315-319.

[225] Three commenters recommended that the new standard be applied to management agreements, without explaining how such a revision would impact existing policies concerning management agreements or why such revisions would be appropriate. AT&T Wireless Comments at 7-8; Cingular Wireless Comments at 12-14; Nextel Partners Reply Comments at 9. One of these also suggested that the new standard be applied when determining whether the licensee or spectrum lessee had control over the leased spectrum for purposes of determining whether potential competitive concerns were raised with regard to the arrangement. AT&T Wireless Comments at 8. Another suggested that the new standard to be applied to "all spectrum transactions" without elaboration. Nextel Partners Reply Comments at 9.

[226] *Further Notice* at ¶¶ 230-231. *See also Secondary Markets Policy Statement* at ¶¶ 6, 37; *Spectrum Policy Task Force Report* at 13-14, 55-58.

of emissions.[227] The *Further Notice* sought comment on the use of advanced technologies in licensed bands in the context of secondary markets and, in particular, requested comment on the *Spectrum Policy Task Force Report* recommendation that the Commission focus on advancing and improving access to spectrum by opportunistic devices through a secondary markets approach, at least in the near term.[228] The *Further Notice* also inquired as to whether the *Report and Order* provided sufficient flexibility for more "dynamic" leasing arrangements made possible by opportunistic devices.[229]

2. Discussion

86. Because we believe that smart or opportunistic technologies hold significant potential to promote access to and more efficient use of the spectrum, we clarify our existing spectrum leasing rules, and introduce an additional means, to help facilitate the development of arrangements involving the use of these new and evolving technologies in services for which spectrum leasing is permitted. Opportunistic use technologies facilitate many dynamic ways of sharing spectrum. For example, smart or cognitive radio devices can potentially sense and adapt to their spectrum environment, find and use spectrum in locations or during time intervals that will not cause interference to other users, and operate across multiple bands and using different protocols. Such devices may also have networking capability, either on a peer-to-peer (device-to-device) basis or by interacting with available wide-area or local-area networks.[230] The spectrum access capabilities of these technologies can be achieved by a variety of potential cooperative approaches, such as secondary markets arrangements, in which users of licensed spectrum arrange access with licensees under mutually agreeable terms.[231] With smart or cognitive radios, for example, it is possible to reconfigure the performance parameters of the individual devices to allow more opportunistic uses of the spectrum. As these capabilities become available on a broader basis, the Commission can facilitate these additional forms of spectrum access by ensuring that our licensing and technical rules do not inadvertently impose barriers to the deployment of such capabilities if and when licensees (or spectrum lessees) seek to take advantage of such capabilities. These cooperative uses of these capabilities would also complement other approaches to promoting spectrum access, *e.g.*, facilitating access for advanced technologies on an unlicensed basis. The approaches considered in this order are cooperative in nature – avoiding placing regulatory barriers on licensees (or

[227] *See Spectrum Policy Task Force Report* at 13-14, 27-30; *Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[228] *Further Notice* at ¶¶ 233-236.

[229] *Id.* at ¶ 236. In the *Further Notice*, we used the term "smart" and "opportunistic" devices interchangeably. *Id.* at ¶ 231. The *Spectrum Policy Task Force Report* uses terms interchangeably as well. *Spectrum Policy Task Force Report* at 14. In the *Cognitive Radio NPRM*, we generally refer to these types of devices as cognitive radios. *See generally Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[230] We discussed the potential technical capabilities of such cognitive radio in more detail in the *Cognitive Radio NPRM. See generally id.*, 18 FCC Rcd at 26866-26870 ¶¶ 20-32.

[231] While a secondary markets approach to promoting access to licensed spectrum is largely market-based and cooperative, other policy options to promoting such access are possible, including some that are not primarily based on cooperation among private actors and that may spring from Commission regulations. For example, in two proceedings currently before the Commission, we discuss a range of policy options, including cooperative approaches as well as the use of licensed spectrum without the licensee's consent. *See Cognitive Radio NPRM*, 18 FCC Rcd 26859; Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, 18 FCC Rcd 25309 (2003).

spectrum lessees) that wish to provide for opportunistic uses of spectrum pursuant to the terms and conditions that they set – so long as they fall within the licensee's spectrum usage rights and are not inconsistent with applicable technical and other regulations imposed by the Commission to prevent harmful interference to other licensees.

87. Recognizing the variety of ways in which advanced technologies enhance opportunities for more parties to gain access to and share the use of the same spectrum, we seek to provide licensees and spectrum lessees the flexibility to enter into mutually beneficial access and use arrangements that take fuller advantage of what these new and innovative technologies may make possible. To that end, we clarify below some of the types of spectrum leasing and other arrangements that could allow for use of advanced technologies, including opportunistic devices. The value of this increased flexibility is reflected in the comments received on this issue. Commenters that addressed this issue maintained that licensees should be permitted to engage in dynamic spectrum leasing arrangements,[232] and generally should be free to weigh the potential benefits and costs of allowing access to licensed spectrum.[233] We also introduce an additional mechanism, which we call a "private commons," that will allow cooperative use arrangements not explicitly recognized within the Commission's policies or rules, and we seek comment in the Second Further Notice on how we can distinguish between these and other arrangements, such as spectrum leasing or end-user arrangements, to avoid unintended and unnecessary barriers to the deployment and use of advanced technologies.[234]

a. Facilitating advanced technologies within existing regulatory frameworks, including dynamic spectrum leasing arrangements

88. We clarify that our spectrum leasing policies and rules permit parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies.[235] Such a clarification generally accords with comments we received. For example, one commenter specifically recommended that the Commission's secondary markets policies and rules be expanded to accommodate "dynamic" spectrum leasing arrangements, and other commenters also endorsed adoption of spectrum leasing policies in which licensees could take fuller advantage of technological advances, including opportunistic use devices, through secondary markets arrangements.[236]

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[232] Verizon Wireless Comments at 5.

[233] *See* Blooston Rural Carriers Comments at 10; Cingular Wireless Comments at 8-9; CTIA Comments at 5-6; Nextel Partners Reply Comments at 10; SBC Comments at 6-7; Sprint Comments at 3-4; T-Mobile Reply Comments at 5-6; Verizon Wireless Comments at 4-5; WCA Comments at 8-9. Many of these commenters also argued that opportunistic use should not occur in licensed bands without the consent of the licensee.

[234] We are separately considering in the Cognitive Radio proceeding issues involved in the authorization of cognitive radio equipment, whether used in conjunction with licensed access to spectrum or under Part 15. *See generally Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[235] We also note that the Commission's existing rules allow providers of wireless network infrastructures, such as CMRS and other providers, to employ opportunistic devices and other advanced technologies so as to better serve existing subscribers or offer services to additional subscribers within a licensed band. Similarly, a licensee with a private network may employ opportunistic devices to enhance communications among users on its network. *See id.*, 18 FCC Rcd at 26863 ¶ 11.

[236] *See* Verizon Wireless Comments at 5. *See generally* Blooston Rural Carriers Comments at 10; Cingular Wireless Comments at 8-9; CTIA Comments at 5-6; Nextel Partners Reply Comments at 10; SBC (continued....)

Consistent with these views, we clarify that parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices.[237] In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Of course, the licensee may not lease spectrum usage rights that exceed the rights it currently holds and, as these examples illustrate, the licensee may choose to lease a more restricted bundle of usage rights.

89. Significantly, these arrangements could facilitate opportunistic use by parties operating at the same power level and under similar technical parameters as the licensee, or they could promote such use at lower power levels. We also emphasize that neither scenario would affect unlicensed operations to the extent they are permitted in that particular licensed band pursuant to Commission rules under Part 15.[238] For example, as set forth in section 15.209 of the Commission's rules and augmented on a band-by-band basis, Part 15 users (*e.g.*, Ultra-Wide Band operators) can operate pursuant to applicable technical and operational rules whether or not opportunistic use or other advanced technologies are employed or authorized by the licensee.[239] We would also expect that new and innovative radiofrequency devices would be agile enough to function on an unlicensed basis or as part of licensed operations. Moreover, the examples discussed here do not provide an exhaustive list of all the possible arrangements that could involve the use of opportunistic devices and be consistent with secondary markets and service rules already in place. Accordingly, in the Second Further Notice, we seek comment on the types of additional commercial or sharing arrangements that would further exploit the benefits of new and innovative technological advances.

90. We recognize that, in some cases, under the current framework for spectrum manager and *de facto* transfer lease arrangements, these options may not be economically or technically feasible due to the transaction costs associated with coordinating many users in a single band, or many users employing advanced technologies to access multiple bands by frequency-hopping. Nonetheless, we do not believe that these should be insurmountable barriers and we concur with the *Spectrum Policy Task Force Report* that "a secondary markets approach by opportunistic devices does not necessarily require the prospective opportunistic user to negotiate individually with each affected licensee," and that band managers, clearinghouses, and other intermediaries could facilitate these transactions.[240] We also agree with the

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Comments at 6-7; Sprint Comments at 3-4; T-Mobile Reply Comments at 5-6; Verizon Wireless Comments at 4-5; WCA Comments at 8-9.

[237] An example of such an arrangement would be a cellular licensee that leases to a manufacturer of low-power opportunistic devices for use of the licensed spectrum on a non-interfering basis.

[238] Although several commenters contended that opportunistic use should not occur in licensed bands without the consent of the licensee, *see* note 233 *supra*, we note that the Commission will generally continue to consider the benefits of Part 15 access on a band-by-band basis.

[239] Under sections 15.205 and 15.209 of the Commission's rules, unlicensed devices are permitted to operate at very low power levels in all bands except certain specified restricted bands. 47 C.F.R. §§ 15.205, 15.209.

[240] *Spectrum Policy Task Force Report* at 57.